IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1554

COUNTY COURT ULSTER COUNTY, NEW YORK; WOODBOURNE CORRECTIONAL FACILITY, WOODBOURNE, NEW YORK,

Petitioners,

against

SAMUEL ALLEN, RAYMOND HARDRICK and MELVIN SIMMONS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[redacted]

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BRIEF FOR PETITIONERS

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioners, the County Court of Ulster County, New York, and the Woodbourne Correctional Facility, pray for a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit entered on January 29, 1977, and orders denying petitioners' motion for rehearing containing a suggestion for rehearing en banc entered on February 1, 1978.

Decisions Below

The orders of the United States Court of Appeals denying petitioners' motion for reargument containing a suggestion for rehearing en banc were entered on February 1, 1978 and are reproduced in Appendix A. The decision of the Court of Appeals is reported at 568 F. 2d 998, and is reproduced in Appendix B. The decision of the District Court, which was affirmed by the Court of Appeals, is unreported and is reproduced in Appendix C. The decision of The Court of Appeals of the State of New York, captioned *People* v. *Lemmons,* is reported at 40 N Y 2d 505, and is reproduced in Appendix D.

Jurisdiction

Jurisdiction of this Court is invoked pursuant to Title 28, United States Code, § 1254(1). The orders of the Court of Appeals denying petitioners' motion for reargument containing a suggestion that the petition be reheard en banc were entered on February 1, 1978.

Questions Presented

1. Whether New York Penal Law § 265.15(3), which permits the presumption that a handgun found in a car is possessed by all the occupants of the car, may be declared unconstitutional on its face by a lower federal court despite a decision of the Court of Appeals of the State of New York upholding the statute's constitutionality.

2. Whether the constitutionality of New York Penal Law § 265.15(3) is properly reviewable by federal habeas corpus petition in light of respondents' failure to object to an incomplete jury charge as well as their deliberate waiver of their automatic right of appeal to the Supreme Court of the United States pursuant to 28 U.S.C. § 1257(2).

Statement

A.

The Arrest

Respondents and Jane Doe, a sixteen year old girl, were driving in a borrowed car on the New York State Thruway on March 28, 1973 when they were stopped by State Police for speeding. The driver, respondent Lemmons, produced a temporary New York registration certificate and Michigan driver's license. A radio check indicated Lemmons to be a fugitive from Michigan on a weapons charge. He was therefore arrested and placed in a patrol car.

At this point one Trooper Askew returned to the vehicle Lemmons had been driving. As Askew peered through the front window on the passenger side, he observed the butt of a handgun protruding from an open handbag resting on the floor between the front seat and the door of the car. Askew opened the door and seized a loaded .45 automatic pistol, beneath which he found a loaded .38 revolver. The remaining three occupants were then arrested. A subsequent search of the vehicle's trunk disclosed a loaded machine gun and more than a pound of heroin. Respondents were indicted for criminal possession of a dangerous drug in the first degree, unlawful possession of a machine gun and unlawful possession of a loaded handgun (two counts).

B.

The Pre-Trial Suppression Motion

After a pre-trial hearing, the trial court denied respondents' motion to suppress the seized contraband. In its decision, the court held that the arrest of Lemmons on the fugitive warrant was valid; that the seizure of the handguns, exposed to open view as they were, was proper; that the arrest of all occupants of the automobile for possession of the handguns was lawful; and that their joint involve-

ment in such handgun charges furnished the police probable cause for the warrantless search of the car trunk.

C.

The Trial

At the trial the prosecution relied upon statutory presumptions to establish respondents' constructive possession of the handguns, the machine gun and the heroin.

No evidence was offered by respondents or Jane Doe to rebut New York Penal Law § 265.15(3), which sets forth the statutory presumption applicable to the possession of a loaded firearm or other dangerous weapon, although they produced some evidence to rebut the presumption that they were in constructive possession of the machine gun and heroin.

At the close of the case, the judge charged the jury that it might rely upon the statutory presumptions to find respondents guilty of possession of the firearms and the heroin. However, the judge failed to charge the jury that § 265.15(3)(a) provides that the presumption does not apply when the handgun is found on the person of one of the occupants of the car. Respondents failed to object to the charge as given, nor did they offer any proposed instruction relating to the "on the person" exception set forth in this provision.*

The jury acquitted the respondents of the first two counts of the indictment, but found them guilty of both counts of unlawful possession of a loaded handgun. At the sentencing proceeding, held on June 28, 1974, respondents were sentenced to a maximum term of seven years on each of the two counts, to run concurrently.

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* The trial judge invited exceptions to the charge three times. There was also a lengthy colloquy covering other aspects of the charge. Nevertheless, the respondents, individually represented by counsel, did not even hint that the court was in error in failing to charge the "on the person" exception.

Jane Doe was adjudicated a youthful offender and given five years probation.

The State Court Appeals

Respondents' convictions were affirmed (3-2) by the Appellate Division, Third Department, 44 A D 2d 243 (1975). The majority affirmed without opinion. The dissenters agreed that the seizure of the gun was valid on a "plain view" theory but concluded that the presumption in § 265.15(3) was inapplicable to petitioners, as the handguns were "upon the person" of Jane Doe, and thus the exception contained in § 265.15(3)(a) applied.

The New York Court of Appeals affirmed the conviction. *People* v. *Lemmons*, 40 N Y 2d 505, 354 NE 2d 836 (1976). The court, after discussing the conditions which prompted the Legislature to enact the statute, clearly stated the basis for its affirmance as follows:

> "[T]he trial court never charged the jury with respect to the 'on the person exception.' Nevertheless the defense did not except to the absence of this language in the court's charge. As a result, what we view as a jury question was never presented to the jury and for the reasons stated *we cannot conclude in this case that as a matter of law the presumption was inapplicable.*" 40 N Y 2d at 512. (emphasis supplied)

In a separate opinion, Judge Jones explicitly restated the narrow basis for the court's affirmance as follows:

> "But no reference was made in the charge to the statutory provision that the presumption would not apply 'if such weapon . . . is found upon the person of one of the occupants.' No exception was taken to this charge and no request was made that the charge be accurately completed. Thus, the jury was never advised of the exception and the case was submitted to and resolved by it on the basis of a blanket presumption which had become the law of the case.

"Accordingly, in the procedural posture in which these verdicts were returned there can only be an affirmance." 40 N Y 2d at 513.

Opinion of the United States District Court for the Southern District of New York

On April 19, 1977, the United States District Court for the Southern District of New York (OWEN, J.) granted respondents habeas corpus relief. Although Judge Owen did not decide whether § 265.15(3) was unconstitutional on its face, he applied the test set forth in *Leary* v. *United States*, 395 U.S. 6 (1969), to the facts of the case and found that possession could not reasonably be inferred from the presence of the handguns in Jane Doe's open purse. He then concluded that as a matter of law, the trial judge was in error in denying the respondents' motions to dismiss at the conclusion of the state's case.

Opinion of the United States Court of Appeals for the Second Circuit

Before reaching the substance of respondents' constitutional claim, the panel of the court below considered and rejected petitioners' procedural arguments. The court first countered petitioners' argument that respondents failed to exhaust their "facial unconstitutionality" claim, raised for the first time in the United States District Court, by concluding that respondents' claim in state court that the statute was unconstitutionally applied to the facts of their case was so closely related to their federal claim that the exhaustion requirement was satisfied.

The court also rejected petitioners' argument that respondents waived their right to argue the facial unconstitutionality of the presumption upon federal habeas corpus review because their failure to object to the trial court's charge, insofar as it omitted a recitation of the "on the person" exception, and indeed their failure to urge in the

state appellate courts that the jury had been charged incorrectly, prevented those tribunals from reaching the merits of their constitutional claim.

After thus concluding that respondents' claim that the statute was facially unconstitutional was properly before it, the court below proceeded to declare the statute unconstitutional on the grounds it could not find any rational basis to support the presumption.

Motion for Reargument With a Suggestion for Rehearing En Banc

As the panel of the court below ruled that the issue of the presumption's facial unconstitutionality had indeed been raised and decided in the New York Court of Appeals, petitioners urged in their motion for reconsideration that respondents thus waived their right to federal review by foregoing automatic appeal to this Court pursuant to 28 USC § 1257(2). Petitioners' motion for reargument with a suggestion for rehearing en banc was denied on February 1, 1978.

REASONS FOR ALLOWANCE OF WRIT

POINT I

The decision below, declaring New York Penal Law § 265.15(3) unconstitutional on its face, although the statute had been upheld by the Court of Appeals of the State of New York, creates a grave conflict between the state and federal courts, departs from the well established principle that a court should restrain from formulating a rule of constitutional law broader than required by the facts before it, and is not in accord with prior decisions of this Court upholding statutory presumptions.

—A—

The decision below is in direct conflict with an earlier decision of the New York Court of Appeals upholding the constitutionality of New York Penal Law § 265.15(3). *People* v. *Russo,* 278 App. Div. 98 (1st Dept.), *aff'd,* 303 N.Y. 673, 102 N.E. 2d 834 (1951). As the lower federal courts do not exercise appellate jurisdiction over state tribunals, *U.S. ex rel. Lawrence* v. *Woods,* 432 F. 2d 1072 (7 Cir., 1970), *cert. denied,* 402 U.S. 983 (1971), the ruling of the state court controls. *People* v. *Molloy,* 21 A D 2d 904 (2nd Dept. 1964); *Walker* v. *Walker,* 51 A D 2d 1029 (2nd Dept. 1976). The obvious judicial dilemma caused by this conflict between the highest court of the State of New York and the United States Court of Appeals for the Second Circuit can only, and in fact, must be resolved by this Court, *U.S. ex rel. Lawrence* v. *Woods, supra.*

The necessity of a resolution of this conflict between the state and federal courts reaches beyond the constitutional question presented by this case. Several other sections of New York's Penal Law permit a presumption of possession to flow from occupancy of a vehicle or room containing

contraband.* The decision of the court below not only subjects many convictions under these statutes to collateral attack in the federal courts, but creates uncertainty and confusion among the police, prosecutors, judges and defense counsel charged with construing these statutes. Furthermore, the denial of certiorari in this case will most certainly result in the prosecution and imprisonment of individuals who will later successfully challenge their convictions in the federal courts.

—B—

Judge Timbers' concurring opinion below contains a cogent analysis of the restraints which preclude a court from "formulating a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *United States* v. *Raines,* 362 U.S. 17 (1959) citing *Liverpool, N.Y. & P.S.S. Co.* v. *Commissioner of Emigration,* 113 U.S. 33, 39 (1885). *See Broadrick* v. *Oklahoma,* 413 U.S. 601, 610-12 (1973); *Ashwander* v. *T.V.A.,* 297 U.S. 288, 347 (1936). Judge Timbers also correctly points out that only in extraordinary circumstances, such as when first amendment interests are implicated, may a court depart from the normal conditions of constraint. Such extraordinary circumstances are seldom encountered in cases involving the criminal process. *See* Note, THE FIRST AMENDMENT OVERBREATH DOCTRINE, 83 HARV. L. REV. 844, 854, n. 33 (1970). In fact, in the area of criminal justice the federal courts are particularly constrained from precipitously declaring a state statute unconstitutional.

Only recently, in *Patterson* v. *New York,* —— U.S. ——, 45 U.S.L.W. 4708 (U.S. June 17, 1977), this Court stressed

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* *E.g.,* New York Penal Law §§ 220.25; 265.15(1); 265.15(2).

the primacy of the states in the administration of criminal justice, and the respect to be accorded their statutes:

> "It goes without saying that preventing and dealing with crime is much more the business of the states than it is of the Federal Government, . . . and that we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States. Among other things, it is 'normally within the power of the state to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion.'" 45 U.S.L.W. at 4709 (citations omitted).

In harmony with the doctrine articulated in *Patterson, supra,* this Court has consistently dismissed appeals from decisions of the New York Court of Appeals upholding the constitutionality of criminal presumptions. *People* v. *Terra,* 303 N.Y. 332, 102 N.E. 2d 576, *appeal dismissed for want of a substantial federal question,* 342 U.S. 938 (1952); *People* v. *Kirkpatrick,* 32 N Y 2d 17, 295 N.E.2d 753, *appeal dismissed for want of a substantial federal question,* 414 U.S. 948 (1973). In fact, the presumption upheld in *Terra,* now contained in New York Penal Law § 265.15(1), is virtually identical to the one at issue herein. Although the court below attempted to distinguish *Terra* from the instant case by claiming that New York law defines occupants of a room more narrowly than occupants of a car, neither the statutes themselves nor any judicial construction thereof makes such a distinction.

In *People* v. *Kirkpatrick, supra,* this Court was asked to consider the constitutionality of New York Penal Law § 235.10 subd. 1, which provides that a person who sells obscene material in the course of his business is presumed to do so with knowledge of both its contents and its obscene character.

Judge Fuld's vigorous dissenting opinion in the New York Court of Appeals, in which Judges Jones (who concurred in the instant case) and Wachtler joined, not only found that the presumption violated defendants' due process rights, but was blatantly violative of the defendants' first amendment rights as well. Thus the Court's dismissal of this appeal is especially persuasive, in view of the favored status usually accorded first amendment interests. *See* Note, THE FIRST AMENDMENT OVERBREATH DOCTRINE, *supra.*

—C—

The proper test for the constitutionality of a presumption has been most definitively set forth by this Court in *Leary* v. *United States,* 395 U.S. 6 (1969), when after reviewing its previous decisions as to the constitutionality of presumptions, it concluded:

> "[A] criminal statutory presumption must be regarded as 'irrational' or 'arbitrary', and hence unconstitutional unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." 395 U.S. at 36 (footnote omitted).

This Court has also cautioned that the judgment of the legislature in determining the rationality of the relationship between the proved fact and the presumed fact should be accorded great weight by the courts, provided this judgment is based upon common experience or reliable empirical data. *Leary* v. *United States, supra* at 39; *United States* v. *Gainey,* 380 U.S. 63 (1965).

The statutory history of New York Penal Law § 265.15(3) shows that this presumption, far from being either irrational or arbitrary, has a sound basis in both "common sense and experience", *Barnes* v. *United States,* 412 U.S. 837, 845 (1973). The New York State Legislature first enacted this presumption into law in 1936 as Penal Law

§ 1898-a, in response to Governor Lehman's anti-crime program, which he introduced by special message to the Legislature in January of that year. PUBLIC PAPERS OF GOVERNOR LEHMAN, 95 (1936). In his memorandum approving the bill, PUBLIC PAPERS, *supra* at 459, the governor noted that this amendment to the Penal Law had been urged for years, particularly by the State Crime Commission, the courts, and police commissioners throughout the state. In 1960, The Joint Legislative Committee on Firearms and Ammunition was created by concurrent resolution of the New York State Assembly and Senate, "to undertake a comprehensive examination and study of all laws pertaining or in any way relating to or affecting the sale, possession and regulation of firearms and ammunition and the administration of such laws." NEW YORK LEG. DOC. No. 29, 9 (1962). During the life of the Committee, it conducted an intensive analysis of the laws of the fifty states, the New York statutes and the judicial constructions thereof. An advisory committee composed of representatives of The New York State Bar Association, County Judges Association, Izaak Walton League, New York State Police, District Attorneys Association, New York State Sheriff's Association, The New York State Rifle and Pistol Association and The New York State Conservation Council worked closely with the Commission in its efforts to revise New York's firearms legislation. Numerous public hearings were held throughout the state, and a fifty point questionnaire was distributed to each of the sixty-two district attorneys, nearly all criminal court judges in the state, police chiefs and numerous rod and gun clubs. Both the public hearings and the questionnaire sought to elicit expert opinion on specific proposals to amend, standardize and conform to judicial construction New York's existing firearms statutes. In 1963 the new statute drafted by the Commission was enacted into law as New York Penal Law § 1899 (L. 1963, ch. 136), and the historic Sullivan Law

repealed. While the presumption at issue herein was carried forward into the new statute, the "on the person" exception now set forth in 265.15(3)(a) was added at that time.

Thus, the New York State Legislature, both in reenacting the presumption and amending it to include the enumerated exceptions to its application, had the benefit of the vast experience of those individuals and institutions most expert in the enforcement and interpretation of New York's gun presumption statute. It should be noted that American Law Institute has approved a presumption regarding possession of criminal instruments in automobiles which is almost identical to the one at issue herein. MODEL PENAL CODE § 5.06(3).

In substituting its own judgment for the informed judgment of the New York State Legislature, the courts below have prohibited the application of the presumption to even the most egregious circumstances, such as when loaded large caliber firearms are on open display in an automobile occupied by more than one person. While the lower court posed the remote hypothetical case wherein the presumption might be applied to a hitchhiker arrested while a passenger in a car containing a concealed Derringer or Barretta, 568 F.2d 1007, it failed to consider that New York Courts have *always* applied the presumption on a case by case basis, *e.g. People* v. *Garcia,* 41 A D 2d 560, 340 N.Y.S. 2d 25 (2nd Dept., 1973); *People* v. *Alston,* —— Misc. 2d ——, N.Y.L.J. April 19, 1978 p. 12 col. 5 (Sup. Ct., Bronx Cty.); *People* v. *Anonymous,* 65 Misc. 2d 288 (Dist. Ct., Nassau Cty., 1970) (presumption applied to a controlled substance).

Moreover, it should be emphasized that the presumption is rebuttable. It merely permits an inference that, in the absence of some explanation, the occupants of an automobile at the time a gun is found within it are in possession of the gun, unless one of the exceptions applies. Even if no

contrary proof is offered, the presumption is not conclusive and may be rejected by the jury. The prosecution at all times retains the burden of proof to establish guilt beyond a reasonable doubt. *People* v. *Leyva,* 38 N Y 2d 160, 168-169, 341 N.E.2d 546 (1975); *People* v. *Terra, supra.* No burden of proof is ever shifted.

The court below places great reliance upon this Court's decision in *United States* v. *Romano,* 382 U.S. 136 (1965). However, a distinction may be easily made between the presumption at issue in *Romano* and New York Penal Law § 265.15. In *People* v. *Leyva, supra,* wherein the New York Court of Appeals upheld the constitutionality of a presumption involving possession of a controlled substance, otherwise identical to § 265.15(3), that court distinguished the presumption in *Romano* from presumptions flowing from presence in an automobile:

> "Indeed the unique and mobile nature of automobiles, and their role in drug traffic also serves to distinguish the case before us from the circumstances found in *United States* v. *Romano,* 382 U.S. 136, 86 S. Ct. 279, 15 L. ed. 2d 210. *Romano* is further distinguishable in that it involved a statute aimed at those who possess or control the manufacturing process rather than at possession of an illegal substance such as drugs (cf. *Leary* v. *United States,* 395 U.S. 6, 89 S. Ct. 1532, 23 L.Ed. 2d 57, *supra; Turner* v. *United States,* 396 U.S. 398, 90 S. Ct. 642 L.Ed. 2d 610 *supra*) and in that it involved imputed possession of large stationary equipment rather than of small, easily transferable packages. As the court's cases in this area make clear, each presumption's rationality must be judged within its own context." 38 N Y 2d at 167, n. 2.

Finally, in *United States* v. *Gainey,* 380 U.S. 63 (1965), decided just a year before *Romano, supra,* this Court affirmed the constitutionality of a statute which permitted

the presumption of carrying on the business of a distiller to flow from unexplained presence at the site of an illegal still.

It is respectfully submitted that the lower court both misconstrued this Court's reasoning in *Romano, supra,* and improperly substituted its own "common experience" for that of the Legislature in order to strike down a statute that has been carefully considered by the Legislature and upheld by the New York Court of Appeals. It is thus a matter of the most grave importance that petitioners' application for certiorari be granted.

POINT II

The failure of respondents to object to the incomplete jury charge as well as their failure to appeal as of right from the decision of the New York Court of Appeals implicitly affirming the constitutionality of New York Penal Law § 265.15(3) constitutes a waiver sufficient to bar habeas corpus relief.

A.

The decision of the court below clearly undercuts the bypass doctrine recently clarified by this Court in *Wainwright* v. *Sykes,* —— U.S. ——, 45 U.S.L.W. 4087 (U.S. June 23, 1977). While the lower court points approvingly to "the advantages that flow from informing a trial judge of the possibility of unconstitutional error at a time when action can be taken to correct it", it attempts to distinguish the instant case from *Wainwright* by concluding that unlike Sykes' failure to make a timely objection under Florida's contemporaneous objection rule, the failure of respondents here to make a timely objection to the incomplete charge did not prevent their claims from being fully considered by the New York Court of Appeals. This "bootstrap" argument must be rejected for two reasons. First, five judges of the New York Court of Appeals clearly stated

that they were *unable* to reach the merits of the respondents' "as applied" claim because of the incomplete charge not objected to. Thus, what the court below described as the "federalism interest" was never vindicated.

Even more importantly, this Court clearly intended *Wainwright* to apply to the precise situation presented by this case. It is likely that if the jury had been properly charged with the "on the person" exception, that charge coupled with the presence of the guns in Jane Doe's purse, would have affected its disposition since the jury acquitted respondents of the machine gun and heroin possession charges solely on the evidence that the trunk was locked and no key had ever been recovered. Justice Rehnquist, who wrote for the majority in *Wainwright,* recognized this precise point in his footnote in *Mullany* v. *Wilbur,* 421 U.S. 684 (1975), in which he states:

> "While *Fay* v. *Noia,* 372 U.S. 391, 9 L Ed. 2d 837, 83 S. Ct. 822 (1963), holds that a failure to appeal through the state-court system from a constitutionally infirm judgment of conviction does not bar subsequent relief in federal habeas corpus, *failure to object to a proposed instruction should stand on a different footing.* It is one thing to fail to utilize the appeal process to cure a defect which already infers on a judgment of conviction, *but it is quite another to forego making an objection or exception which might prevent the error from ever occurring.* Cf. *Davis* v. *United States,* 411 U.S. 233, 36 L. Ed. 2d 216, 93 S. Ct. 1577 (1973)." (emphasis supplied). 421 U.S. at 704.

B.

If the court below is correct in its analysis that despite respondents' failure to object to the incomplete jury charge, the New York Court of Appeals implicitly upheld the constitutionality of New York Penal Law § 265.15(3), respondents were therefore entitled to automatic review of

that decision by appeal to the Supreme Court of the United States under 28 U.S.C. § 1257(2). Unlike the Supreme Court's certiorari jurisdiction, which is discretionary, this Court would have "had no discretion to refuse adjudication of the case on its merits. . . ." *Hicks* v. *Miranda,* 422 U.S. 322, 344 (1975). Any disposition of the appeal, including either summary affirmance or summary dismissal for "want of a substantial federal question", would have been an adjudication on the merits of the very claim presented in this habeas corpus proceeding.

If respondents had taken the appeal to which they were entitled, and had received the "actual adjudication" of the constitutional claim they now present, to which they were also entitled, they would be barred from relitigating the same claim in a habeas corpus proceeding. Congress has so provided in 28 U.S.C. § 2244(c) which "embodies a recognition that if [the Supreme] Court has 'actually adjudicated' a claim on direct appeal or certiorari a state prisoner has had the federal redetermination to which he is entitled." *Neil* v. *Biggers,* 409 U.S. 188, 191 (1972). This statute was "[c]onsistent with the overall scheme of allowing a petitioner to obtain *one* federal determination" of his federal constitutional claims. *United States ex rel. Radich* v. *Criminal Court of the City of New York,* 459 F. 2d 745, 749 (2d Cir. 1972), *cert. denied sub nom., Ross* v. *Radich,* 409 U.S. 1115 (1973) (emphasis supplied). Thus there can be no dispute that this case would not be before this Court today had respondents taken their appeals of right to the Supreme Court from the New York Court of Appeals in 1976.

Last term, in *Wainwright* v. *Sykes, supra,* this Court enunciated a new test to determine when a state prisoner's failure to raise an issue of federal constitutional law at his state trial would bar him from pursuing that claim in a subsequent federal habeas corpus proceeding. This Court held that the prisoner would be barred from presenting that claim "absent a showing of cause for the

non-compliance and some showing of actual prejudice resulting from the alleged constitutional violation." *Wainwright* v. *Sykes, supra,* 45 U.S.L.W. at 4811. The Court noted that this test was more restrictive upon the prisoner than the "deliberate bypass" test set forth in dicta in *Fay* v. *Noia,* 372 U.S. 391, 438 (1963) and expressly stated that "[i]t is the sweeping language of *Fay* v. *Noia* . . . which we today reject." *Wainwright* v. *Sykes, supra,* 45 U.S.L.W. at 4812.

The test of *Wainwright* v. *Sykes, supra,* applies to respondents' failure to obtain a final *federal* determination of their present claim from this Court on direct appeal. In fact, the Court's analysis of its holding in *Wainwright* applies with equal or greater force to this situation even though (indeed, *because*) it was a federal rather than state determination which respondents waived.

Moreover, the state's interest in the "finality of criminal litigation" extends far beyond this case. The constitutional challenge presented herein directly threatens the conviction of every prisoner in New York to whom § 265.15(3) was applied as well as convictions obtained pursuant to the other "presumption of possession" statutes in New York's Penal Law. If the statute is ultimately invalidated, a serious possibility exists that the Court's decision would apply retroactively. See *Hankerson* v. *North Carolina,* 432 U.S. 233 (1977); *Ivan V.* v. *City of New York,* 407 U.S. 203 (1972). In that case, the delay in the determination of the constitutional issues raised herein—due *solely* to respondents' failure to take their appeal of right to the Supreme Court—would put New York to the enormous unnecessary expense of retrying as many as hundreds of prisoners convicted in cases involving these presumptions in the period since this Court would have decided this issue on direct appeal.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: New York, New York
April 26, 1978

Respectfully submitted,

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Appendix A—Orders of the United States Court of Appeals Denying the Petition for Rehearing Containing a Suggestion for Rehearing En Banc.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the First day of February, one thousand nine hundred and seventy-eight.

77-2059

Samuel Allen, Raymond Hardrick and Melvin Lemmons,

Petitioners-Appellees

v.

County Court, Ulster County, New York, Warden, Woodbourne Correctional Facility, Woodbourne, New York,

Respondents-Appellants.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the respondents-appellants, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

IRVING R. KAUFMAN
Chief Judge
IRVING R. KAUFMAN

Appendix A—Orders of the United States Court of Appeals Denying the Petition for Rehearing Containing a Suggestion for Rehearing En Banc.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the first day of February, one thousand nine hundred and seventy-eight.

Present: HON. WALTER R. MANSFIELD,
HON. WILLIAM H. TIMBERS,
Circuit Judges

HON. JOHN F. DOOLING,
District Judge

77-2059

Samuel Allen, Raymond Hardrick and Melvin Lemmons,
Petitioners-Appellees

v.

County Court, Ulster County, New York, Warden, Woodbourne Correctional Facility, Woodbourne, New York,
Respondents-Appellants.

A petition for a rehearing having been filed herein by counsel for the respondents.

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

A. DANIEL FUSARO
Clerk

Appendix B—Decision of the United States Court of Appeals for the Second Circuit.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 158—September Term, 1977.

(Argued September 15, 1977 Decided November 29, 1977.)

Docket No. 77-2059

SAMUEL ALLEN, RAYMOND HARDWICK
and MELVIN LEMMONS,
Petitioners,

—against—

COUNTY COURT, ULSTER COUNTY, NEW YORK WOODBOURNE CORRECTIONAL FACILITY, Woodbourne, New York,
Respondents.

Before:

MANSFIELD and TIMBERS, *Circuit Judges,*
and DOOLING, *District Judge.**

Appeal from the issuance by the District Court for the Southern District of New York, Richard Owen, *Judge,* of a writ of habeas corpus setting aside petitioners' convictions by the State of New York of felonious possession of a firearm in violation of the N.Y. Penal Law § 265.05(2) (McKinney's 1967) (now § 265.02(4), McKinney's 1976-77 Supp.) on the ground that N.Y. Penal Law § 265.15(3) (McKinney's 1976-77 Supp.), which makes the presence of

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* Of the United States District Court for the Eastern District of New York, sitting by designation.

a firearm in an automobile presumptive evidence of its possession by all persons occupying the car at the time when the weapon is found, is unconstitutional as applied in this case.

Affirmed on the ground that N.Y. Penal Law § 265.15(3) is unconstitutional on its face.

EILEEN SHAPIRO, Assistant Attorney General, New York, N.Y. (Louis J. Lefkowitz, Attorney General of the State of New York, Samuel A. Hirshowitz, First Assistant Attorney General, Lillian Z. Cohen, Assistant Attorney General, New York, N.Y., of counsel), *for Respondents.*

MICHAEL YOUNG, Esq., New York, N.Y. (Goldberger, Feldman & Breitbart, New York, N.Y., of counsel), *for Petitioners.*

MANSFIELD, *Circuit Judge:*

The principal issue in this case is the constitutionality of a New York statute which makes the "presence in an automobile . . . of any firearm . . . presumptive evidence of its possession by all persons occupying such automobile at the time such weapon . . . is found, except under the following circumstances: (a) if such weapon . . . is found upon the person of one of the occupants therein. . . ."[1] Judge Richard Owen of the Southern District of

[1] N.Y. Penal Law § 265.15(3) (McKinney's 1976-77 Supp.) provides:

"3. The presence in an automobile, other than a stolen one or a public omnibus, of any firearm, defaced firearm, silencer, explosive or incendiary bomb, bombshell, gravity knife, switchblade knife, dagger, dirk, stiletto, billy, black-

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New York granted appellees' application as state prisoners for a writ of habeas corpus on the ground that this statutory presumption was unconstitutional as applied in their state trial for felonious possession of a loaded firearm, N.Y. Penal Law §265.05(2) (McKinney's 1967) (now found at § 265.02(4) (McKinney's 1976-77 Supp.)). Because we conclude that the presumption is unconstitutional on its face, we affirm.

On March 28, 1973, an automobile driven by appellee Lemmons, in which appellees Allen, Hardrick and one "Jane Doe"[2] were passengers, was stopped by State Police for speeding on the New York State Thruway. When the car was stopped Lemmons was in the driver's seat, Jane Doe in the right front seat, and Allen ond Hardrick in the back seat. After Lemmons had left the car and had been arrested for reasons not relevant here,[3] one of the police

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jack, metal knuckles, chuka stick, sandbag, sandclub or slungshot is presumptive evidence of its possession by all persons occuying such automobile at the time such weapon, instrument or appliance is found, except under the following circumstances: (a) if such weapon, instrument or appliance is found upon the person of one of the occupants therein; (b) if such weapon, instrument or appliance is found in an automobile which is being operated for hire by a duly licensed driver in the due, lawful and proper pursuit of his trade, then such presumptoin shall not apply to the driver; or (c) if the weapon so found is a pistol or revolver and one of the occupants, not present under duress, has in his possession a valid license to have and carry concealed the same."

The only difference between this provision and the one that was applicable during the appellees' trial is the addition of chuka sticks to the list of weapons to which the presumption applies.

[2] Ms. Doe, a juvenile, was tried with the appellees, convicted and sentenced to five years probation. Her case is not before us.

[3] When the car was pulled over, Lemmons produced his driver's license. A radio check indicated—mistakenly as it turned out—that he was wanted on a fugitive warrant from Michigan, and he was arrested for that reason.

officers returned to the car, looked through the front window on the passenger's (Doe's) side, and saw part of a handgun protruding from a ladies' handbag resting on the floor of the car next to the right front door. A search of the handbag revealed a loaded .45 automatic pistol and a loaded .38 revolver.[4] Appellees and Doe were indicted by the State of New York, tried before a jury in the Ulster County court and convicted of felonious possession of these two weapons in violation of N.Y. Penal Law § 265.02(2). At trial the prosecution relied entirely on the statutory presumption to establish the defendants dominion or control over the guns,[5] introducing no evidence other than appellees' presence in the car in which the handbag containing the guns was also present to demonstrate possession.

At the close of the state's case appellees moved to dismiss the indictment, arguing that the presumption did not apply to them, since the guns had been "found upon the person" of Jane Doe within the meaning of that exception to the presumption. See N.Y. Penal Law § 265.15(3), quoted in fn. 1. This motion was denied. Thereafter, in its instructions the court informed the jurors of the statutory presumption and that they could "infer and draw a conclusion that such prohibited weapon was possessed by each of the defendants who occupied the automobile at the

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[4] A subsequent search of the trunk of the car in which the appellees were riding uncovered a machine gun and more than a pound of heroin, but Jane Doe and the appellees were all acquitted on charges arising out of this search.

[5] The State has argued on occasion that the large caliber of these guns was some evidence that Jane Doe, a 16-year old girl, was not their owner. Even if the inference is accepted, of course, it reveals nothing about the identity of the person or persons for whom Doe may have been holding them—be it appellees or some unknown third party or parties.

time when such instruments were found," but omitted any reference to the statute's "upon the person" exception. No objection to the omission was voiced. After a guilty verdict had been returned, appellees moved to set it aside and to dismiss the indictment, renewing their claim that the presumption was inapplicable to them as a matter of law and arguing in addition that, if the presumption were found applicable, it was unconstitutional as applied. This motion was also denied.

Appellees' convictions were affirmed by the Appellate Division, Third Department, *People* v. *Lemmons,* 49 App. Div. 2d 639, 370 N.Y.S.2d 243 (1975), two of the five judges dissenting in part, and by the New York Court of Appeals, *People* v. *Lemmons,* 40 N.Y.2d 505, 354 N.E.2d 836, 387 N.Y.S.2d 97 (1976), with two judges dissenting in part. The latter court held that the evidence bearing on applicability of the presumption had warranted submission of the question to the jury but declined to go further, noting that the defendants had failed to object to the omission of the "upon the person" exception from the jury charge. Although the majority opinion did not explicitly deal with the issue, it implicitly upheld the statute's constitutionality, discussing its legislative history and the reasoning behind its enactment. The defendants had contended before the Appellate Division and the Court of Appeals that the statute was unconstitutional as applied, citing *Leary* v. *United States,* 395 U.S. 6 (1969), in support of their argument that "a presumption must be regarded as 'irrational' or 'arbitrary,'' and hence unconstitutional, unless it can be said with substantial assurance that the presumed fact is more likely than not to flow from the proven fact upon which it is made to defend." (Defendants' brief before App. Div., p. 23, and brief before Court of Appeals, p. 20) Moreover, Judges Wachtler and Fuchsberg main-

tained in dissent that the presumption could not constitutionally be applied in this case.[6] 40 N.Y.2d at 513-16.

Appellees thereafter filed their petition for a writ of habeas corpus in the Southern District of New York, claiming that New York's presumption was unconstitutional both on its face and as applied to their case and that the failure to charge the jury as to the possible applicability of the "upon the person" exception constituted a denial of due process.[7] Judge Owen issued the writ, holding that the statutory presumption was unconstitutional as applied.[8]

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[6] The New York Court of Appeals could not, of course, simply ignore appellees' constitutional claim and thereby force them to undertake another round of state court litigation. E.g., *Eaton* v. *Wyrick*, 528 F.2d 477, 480 (8th Cir. 1975) ("State courts need not have definitively ruled on the merits of the issues raised by a petitioner seeking federal habeas corpus relief; rather, it is sufficient that the state courts have been *properly presented* with the *opportunity* to rule on the issues."); see *United States* v. *Fay*, 333 F.2d 815 (2d Cir. 1964).

[7] Because we find the presumption unconstitutional, we need not reach either (1) the question of whether the appellees forfeited their claim based on the court's failure to instruct regarding the "on the person" exception by failing to object to the trial judge's charge on this basis, see *Wainwright* v. *Sykes*, 45 U.S.L.W. 4807 (1977), or (2) the merits.

[8] In addition, Judge Owen, noting that the statutory presumption does not operate when the weapon is found "upon the person" of another occupant, suggested that this exception would apply in the present circumstances, since the contents of Doe's handbag, including the weapons, would necessarily be upon her person. However, since federal courts may grant habeas corpus relief to a state prisoner only "on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States," 28 U.S.C. § 2254(a), a state court finding as to the sufficiency of evidence—in this case the evidence on the issue of whether the weapons were on Doe's person—rarely presents the kind of federal question cognizable on habeas corpus. See p. 563, *infra*. More-

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On appeal, the State argues (1) that the issue of the presumption's constitutionality on its face is not properly before this court because of the appellees' alleged failure to exhaust state remedies with regard to this claim, (2) that the presumption is in any event facially valid, and (3) that Judge Owen's holding that the statute was unconstitutional as applied was an improper ruling on an issue of state law. Because of the grounds of our disposition, we need deal only with the first two contentions.

Discussion

An applicant for federal habeas relief must first exhaust available State remedies before filing his application. 28 U.S.C. §2254(b)-(c); *Fay* v. *Noia*, 372 U.S. 391, 434-35 (1963). However, "petitioners are not required to file 'repetitious applications' in the state courts." *Wilwording* v. *Swenson*, 404 U.S. 249, 250 (1971) per curiam); *Brown* v. *Allen*, 344 U.S. 443, 448-49 n.3 (1943). "Once a federal question has been fairly presented to the state courts, the exhaustion requirement is satisfied." *Picard* v. *Connor*, 404 U.S. 270, 275 (1971). Nor is a habeas petitioner required to pursue available state remedies for collateral

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over, the majority opinion of the New York Court of Appeals took the view that the placement of the weapon in Doe's handbag did not necessarily indicate that she was "in sole and exclusive possession of the weapon." Appellants here point to other circumstances—the large calibers of the two weapons, the tender age of Doe (16 years) and the protrusion of the gun from her bag—as support for an inference by the jury that as a young "moll" she was holding the guns for the others or that, upon the car being flagged down by the police, they stuffed their guns into her bag in order to avoid being caught with the weapons on their adult persons, knowing that she would be treated as a youthful offender.

attack if he has persented his federal claims to the state courts on direct appeal. *United States ex rel. Newsome* v. *Malcolm*, 492 F.2d 1166, 1169 & n.4 (2d Cir. 1974), *aff'd. sub nom. Lefkowitz* v. *Newsome*, 420 U.S. 283 (1975).

In this case appellees have consistently argued, both at their state trail and on appeal, that the presumption was unconstitutional as applied to them.[9] However, appellants urge that appellees' contention here that the presumption

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[9] The memos of law submitted by the appellees to the New York trial and appellate courts each contained the following passages:

> "Second, if the presumption is applicable here, then it is unconstitutional as applied.
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> "In *Leary* v. *United States*, 395 U.S. 6 (1969), the Supreme Court held that a presumption must be regarded as 'irrational' or 'arbitrary', and hence unconstitutional, unless it can be said with substantial assurance that the presumed fact is more likely than not to flow from the proven fact upon which it is made to depend. Id. at 36. . . .
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> "Assuming that the presumption is constitutional on its face, (*People* v. *De Leon*, 32 N.Y.2d 944 (1973), it is clearly unconstitutional as applied. There can be no 'substantial assurance' that a defendant in a car is more likely than not to know what is on the person of other occupants of the car. . . .
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> "In conclusion, it is apparent that the statutory presumption set out in § 265.15 cannot apply to those who were merely occupants of this car. This is so both statutorily and constitutionally. . . .

We note that even though these papers do not explicitly argue the facial constitutionality of the presumption, the state was uncertain during oral argument as to whether the issue had been raised. However, because habeas corpus petitioners bear the burden of demonstrating that they have exhausted state remedies, e.g., *Baldwin* v. *Lewis*, 442 F.2d 29, 35 (7th Cir. 1971); *Bond* v. *Oklahoma*, 546 F.2d 1369, 1377 (10th Cir. 1976), we will assume that the issue was not pressed apart from the appellees' contentions regarding the presumption's constitutionality as applied.

is unconstitutional on its face represents a "different" claim that was not presented in the state courts. The state remedies, the argument goes, were therefore not exhausted. However, as the Supreme Court pointed out in *Picard* v. *Connor*, in determing whether a claim raised in habeas proceedings is substantially the same as that preveiously presented to the courtts of a state,

> *"Obviously, there are instances in which 'the ultimate question for disposition' . . . will be the same despite the variations in the legal theory or factual allegations urged in its support.* A ready example is a challenge to a confession predicated upon psychological as well as physical coercion. . . . We simply hold that the substance of a federal habeas corpus claim must first be presented to the state courts." (Emphasis added.) 404 U.S. at 275, 277-78.

Applying this principle to the present case, we conclude that the "ultimate question for disposition" posed by appellees' argument that the presumption is unconstitutional its face is not substantially different from that presented by their claim in the state courts to the effect that the statute is unconstitutional as applied. The fundamental question in either case is whether there exists a sufficient empirical connection between the "proved fact," here the presence in a car of a gun, and the "presumed fact," here its possession by all occupants of the car. Compare *Leary* v. *United States*, 395 U.S. 6. 29-54 (1969) (facial constitutionality of a presumption), with *Turner* v. *United States*, 396 U. S. 398, 418-19 & n.39 (1970) (constitutionality as applied). While the factual inquiry may be somewhat more constrained in an "as applied" adjudication, see p. 562-64 *infra*, New York certainly cannot complain that its courts

have not had the "first opportunity" to rule on the legislative facts underying its presumption.[10]

Our conclusion that the issue of the presumption's constitutionality has been "fairly presented to the state courts" is wholly consistent with the equitable nature of the exhaustion requirement. This prerequisite to the writ should not be construed as the functional equivalent of the formalities associated with common law pleading. "The exhaustion requirement is a judicially crafted instrument which reflects a careful balance between important interests of federalism and the need to preserve the writ of habeas corpus as a 'swift and imperative remedy in all cases of illegal restraint or confinement." *Braden* v. *30th Judicial Circuit Court,* 410 U.S. 484, 490 (1973). "The exhaustion requirement is merely an accommodation of our federal system designed to give the State an initial 'opportunity to pass upon and correct' alleged violations of its prisoners' federal rights." *Wilwording* v. *Swenson, supra,* 404 U.S. at 250. In this case, New York has had an "initial opportunity" to rule on the rationality of the connection between presence in a car with a gun and possession of it; to require more would not serve the interests of federalism but would

[10] The substantial equivalence of the claims asserted before the state and federal courts in this case is apparent by contrast to those cases in which this court has found that a new claim has been presented in a federal habeas corpus proceeding. See, e.g., *Fielding* v. *LeFevre,* 548 F.2d 1102 (2d Cir. 1977) (a state court claim that sentence was excessively harsh not the equivalent of a habeas claim that the trial judge had chilled exercise of right to trial); *Mayer* v. *Moeykens,* 494 F.2d 855, 858-59 (2d Cir.), *cert. denied,* 417 U.S. 926 (1974) (claim that police lacked probable cause for an arrest different from claim that warrant was insufficient); *United States ex rel. Nelson* v. *Zelker,* 465 F.2d 1121, 1125 (2d Cir.), *cert. denied,* 409 U.S. 1045 (1972) (argument that joint trial of co-conspirators constituted a denial of due process reformed on habeas into a *Brady* claim).

undermine habeas corpus as a "swiftt and imperative remedy."

Moreover, it is readily apparent that an application for state collateral review in the present case would be a wholly futile exercise. First of all, since the New York Court of Appeals has refused to declare the presumption unconstitutional as applied to a situation in which weapons, although in the same car as the occupants, were in the handbag of another person (Doe), it is inconceivable that that court would reverse its field to hold that the statutory presumption, which may be applied in circumstances less favorable to the occupants than those present here, is nevertheless facially unconstitutional. Secondly, in *Stubbs* v. *Smith,* 533 F.2d 64 (2d Cir. 1976), although we found it unnecessary to pass upon the merits of a habeas petitioner's constitutional challenge to the very presumption before us, we declined to require the petitioner to exhaust state court remedies on that issue, even though he had not previously raised it, since the New York Court of Appeals had already rejected the substance of the petitioner's legal position in previous cases, see *People* v. *Russo,* 303 N.Y. 673, 102 N.E.2d 834 (1951); *People* v. *Leyva,* 38 N.Y.2d 160, 341 N.E.2d 546, 379 N.Y.S.2d 30 (1975), and it had given no indication at the time of his federal petition that it would reconsider its previous holdings. 533 F.2d at 69.[11]

[11] Although a New York trial court may entertain a motion to vacate a prior judgment on the ground that it was "obtained in violation of a right of the defendant under the constitution . . . of the United States," N.Y. Crim. Proc. L. § 440.10(1)(h), such a motion must be denied if the court finds that no adequate appellate review of the ground for relief occurred because of a defendant's "unjustifiable failure to raise such ground or issue upon an appeal actually perfected by him." *Id.* § 440.10(2)(c). In the present case appellees' reasons for not urging the facial unconstitutionality

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To require exhaustion in these circumstances would serve no policy associated with federalism, but would frustrate appellees' efforts to recover their liberty promptly.

For closely analogous reasons, we also conclude that appellees have not forfeited the right to argue the facial unconstitutionality of the presumption before the federal courts. See generally *Wainwright* v. *Sykes*, —— U.S. ——, 45 U.S.L.W. 4807 (1977). They have persistently pressed a substantially equivalent position before three different courts in New York, and it would be unreasonable for us to conclude that, although they need not pursue further state remedies because they have already confronted the state courts with the "ultimate question for disposition before us," their efforts were not sufficient to avoid a forfeiture of federal relief. *Wainwright*, which represents the Supreme Court's latest word on procedural forfeitures in habeas cases, although severely limiting the

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of the statutory presumption are that it was implicit in the constitutional claim raised and that the substance of the claim had been rejected in earlier cases. We believe that in this context appellees would find it extremely difficult, if not impossible, to persuade the state courts to reach the merits of their claim of facial unconstitutionality upon any motion to vacate sentence which we might require them to file.

Such a motion to vacate sentence must also be denied if the trial court finds that "the ground or issue raised upon the motion was previously determined on the merits upon an appeal from the judgment. . . ." N.Y. Crim. Proc. L. § 440.10(2)(a). If we were to require further recourse to state proceedings, and the state trial court were to find (as would not be unlikely that the New York Court of Appeals had implicitly disposed of the issue of facial validity when it found the presumption constitutional as applied, the irony would be apparent. State prisoners who, by hypothesis, had been told by us that they had failed to present a claim to the state courts would be informed by the state that their claim had already been determined on the merits.

applicability of the *Fay* v. *Noia* "deliberate bypass" standard, is consistent with our decision on this issue. In *Wainwright* the petitioner sought habeas relief on the ground that a confession read into evidence at his state court trial had been obtained in violation of his *Miranda* rights. However, he had failed to object to its admission at the trial. The Supreme Court held that the failure to comply with Florida's "contemporaneous objection" rule barred fedeal habeas corpus review of his *Miranda* claim, absent any showing of "cause" for the procedural default and "prejudice" resulting from it. The Court explained that its new standard for procedural forfeitures was justified because Florida's rule "deserves greater respect than *Fay* gives it, both for the fact that it is employed by a coordinate jurisdiction within the federal system and for the many interests which it serves in its own right"—chiefly the advantages that flow from informing a trial judge of the possibility of constitutional error at a time when action can be taken to correct it. 45 U.S.L.W. at 4812-13.

Here, neither *Wainwright* rationale is implicated. As we indicated above, whatever federalism interest New York may have had in a first opportunity to pass on the facial validity of its presumption was fully vindicated when the New York Court of Appeals was presented with the claim that it was unconstitutional as applied. Moreover, to consider the facial validity of the presumption here would not jeopardize the orderly presentation of claims of constitutional error to the New York trial courts; the State has never argued that it was not alerted to the possibility that its statute could not be used against the appellees in time to take appropriate action during their trial.

Having concluded that the question of the constitutionality of the New York presumption on its face is properly before us, we turn to the merits.

The substantial equivalent of the New York presumption of possession of a weapon by occupants of an automobile based upon its presence in the car was first enacted in 1936,[12] some years before a series of Superme Court cases redefined the constitutional standards by which statutory presumptions are to be judged. When the legislature first acted, the most current statement of the law was *Morrison* v. *California,* 291 U.S. 82 (1934), a case in which the defendants were charged with violation of a statute prohibiting alien possession of agricultural property and the Court considered the constitutionality of a California statute which shifted to them the burden of proving their citizenship or eligibility for it once the State had shown that they possessed agricultural property. Justice Cardozo's opinion explained that the constitutionality of presumptions or regulations of the burden of proof depended on a variety of circumstances, of which two were paramount:

> "For a transfer of the burden, experience must teach that the evidence held to be inculpatory has at least a sinister significance . . . or if this at times be lacking, there must be in any event a manifest disparity in convenience of proof and opportunity for knowledge, as, for instance, where a general prohibition is applicable to every one who is unable to bring himself within the range of an exception." 291 U.S. at 90-91.

However, in *Tot* v. *United States,* 319 U.S. 463 (1943), decided seven years after the enactment of the New York presumption here at issue, the Court, in nullifying a statutory presumption to the effect that possession of a firearm shall be presumptive evidence of its transportation or receipt in interstate commerce, shifted its position on the

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[12] 1936 N.Y. Laws, ch. 390.

permissible justifications for presumptions:

> "[T]he due process clauses of the Fifth and Fourteenth Amendments set limits upon the power of Congress or that of a state legislature to make the proof of one fact or group of facts evidence of the existence of the ultimate fact on which guilt is predicated. The question is whether, in this instance, the Act transgresses those limits.
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> "The Government seems to argue that there are two alternative tests of the validity of a presumption created by statute. The first is that there be a rational connection between the facts proved and the fact presumed; the second that of comparative convenience of producing evidence of the ultimate fact. We are of opinion that these are not independent tests but that the first is controlling and the second but a corollary. Under our decisions, a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience. . . .
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> "Nor can the fact that the defendant has the better means of information, standing alone, justify the creation of such a presumption. In every criminal case the defendant has at least an equal familiarity with the facts and in most a greater familiarity with them than the prosecution. It might, therefore, be argued that to place upon all defendants in criminal cases the burden of going forward with the evidence would be proper. But the argument proves too much. If it were sound, the legislature might validly command that the finding of an indictment, or mere proof of the identity of the accused, should create a presumption of the

existence of all the facts essential to guilt. This is not permissible. . . .

"Doubtless the defendants in these cases knew better than anyone else whether they acquired the firearms or ammunition in interstate commerce. It would, therefore, be a convenience to the Government to rely upon the presumption and cast on the defendants the burden of coming forward with evidence to rebut it. But, as we have shown, it is not permissible thus to shift the burden by arbitrarily making one fact, which has no relevance to guilt of the offense, the occasion of casting on the defendant the obligation of exculpation. The argument from convenience is admissible only where the inference is a permissible one, where the defendant has more convenient access to the proof, and where requiring him to go forward with proof will not subject him to unfairness or hardship." 319 U.S. 467-68, 469-70.

Subsequent cases echo *Tot* and leave no doubt that a state may not erect a presumption simply because evidence of a fact necessary for a criminal conviction is more likely to be available to a defendant than to the prosecution. *Leary* v. *United States,* 395 U.S. 6, 32-34, 44-45 (1969); *Turner* v. *United States,* 396 U.S. 398, 408 n.8 (1970); *Barnes* v. *United States,* 412 U.S. 837, 846 n.11 (1973).[13]

Beginning with *Tot,* therefore, the Supreme Court has emphasized that the constitutionality of a statutory pre-

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[13] The Supreme Court has also repudiated the notion that merely because the legislature could criminalize an act it may make that act presumptive evidence of a criminal offense. *Tot* v. *United States, supra,* 319 U.S. at 472; *Leary* v. *United States, supra,* 395 U.S. at 34, 37; *United States* v. *Romano,* 382 U.S. 136, 142-44 (1965); *Turner* v. *United States, supra,* 396 U.S. at 407-08 n.8. Here, therefore, it does not matter whether New York might have made presence in a car with a gun criminal.

sumption turns on the substantiality of the relation between the fact activating the presumption (the proved fact) and the presumed fact. In *United States* v. *Gainey,* 380 U.S. 63 (1965), and *United States* v. *Romano,* 382 U.S. 136 (1965), the Court applied without much elaboration the *Tot* test, which required simply that there be "a rational connection between the fact proved and the ultimate fact presumed," to two federal statutes that "deemed" presence near a still to be sufficient evidence of crimes involving illegal distilling operations. In *Gainey* the Court found the requisite "rational connection" between presence near a still and the broad substantive offense of "carrying on the business of a distiller." In *Romano,* by contrast, the Court noted that the crime of possession was a much narrower offense than that at issue in *Gainey,* and concluded that the relation between presence near and possession of a still was "too tenuous to permit a reasonable inference of guilt—'the inference of the one from proof of the other is arbitrary' . . . *Tot* v. *United States,* 319 U.S. 463, 467." 382 U.S. at 141.

In *Leary* v. *United States, supra,* the Court undertook to clarify the meaning of the *Tot* rational connection standard. After reviewing its cases, the Court summarized their teachings as follows:

> "The upshot of *Tot, Gainey,* and *Romano* is, we think, that a criminal statutory presumption must be regarded as 'irrational' or 'arbitrary,' and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." 395 U.S. at 36.

Applying this standard, the Court declared invalid a statutory presumption, 21 U.S.C. § 176a, authorizing the jury to infer from a person's possession of marijuana that the

defendant had knowledge of its unlawful importation into the United States.[14]

Leary's reasoning elucidates the judicial inquiry that must be undertaken when a presumption is challenged as unconstitutional. The Court noted that "the congressional determination favoring the particular presumption must, of course, weigh heavily," 395 U.S. at 36, but it engaged in a lengthy independent discussion of the documentary evidence bearing on the sources of marijuana consumed in this country—and their relative importance—and the likelihood that a possessor of that drug would be aware of its origins, *id.* at 37-54. The clear implication was that appellate courts may not simply accept on faith a legislative assertion that proved and presumed facts are related; rather, it must satisfy itself, with facts developed through judicial notice if necessary, see *United States* v. *Gonzales,* 442 F.2d 698, 707 & n.4 (2d Cir. 1971) (en banc), *cert. denied sub nom. Ovalle* v. *United States,* 404 U.S. 845 (1971), of a presumption's empirical validity.

Finally, in *Turner* v. *United States,* 396 U.S. 398 (1970), the Court applied the analysis unveiled in *Leary* to a variety of similar statutory presumptions involving heroin and cocaine. The first principle of *Leary* was reiterated: A presumption must be declared unconstitutional "unless it can at least be said with substantial assurance that the

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[14] The Court also raised the possibility that a presumption satisfying the "more likely than not" test might also be required to satisfy the criminal "reasonable doubt" standard if proof of the crime charged or an essential element thereof depended upon the presumption's use, but declined to reach the issue because the presumption at issue failed to meet even the less stringent test. 395 U.S. at 36 n.64. We decline to reach this issue in this case for the same reason; we hold that New York's presumption does not satisfy the "more likely than not" test.

presumed fact is more likely than not to flow from the proved fact," 396 U.S. at 405.[15]

Under the New York statutory presumption at issue in the present case the presence of a gun in a car (the proved fact) constitutes "presumptive evidence" of its possession by all persons occupying the car (the presumed fact). N.Y. Penal Law § 10.00(8) defines the term "Possess" as meaning "to have physical possession or otherwise to exercise dominion or control over tangible property,"[16] and this definition has been restated in cases involving firearms as requiring that the gun be "within the immediate control and reach of the accused, and where it is available for unlawful use if he so desires." E.g., *People* v. *Lemmons,* 40 N.Y.2d 505, 509-10, 354 N.E.2d 836, 387 N.Y.S.2d 97, 100 (1976); *People* v. *Lo Turco,* 256 App. Div. 1098, 11 N.Y.S.2d 644, *aff'd.,* 280 N.Y. 844, 21 N.E.2d 888 (1939).

Applying the standards established by the Supreme Court, this statutory presumption must be declared unconstitutional on its face unless it can be said with substantial assurance that an inference of possession (as thus defined) of a gun by a car's occupants is more likely than not to flow from the gun's presence in the vehicle. We fail to find any rational basis for such an inference, either in logic or experience. There is nothing about the simultaneous presence of occupants and a gun in an automobile that makes it more likely than not that the former control the latter or that they even know of its presence. The presumption obviously sweeps within its compass (1)

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[15] Later, in *Barnes* v. *United States,* 412 U.S. 837, 841-43, 845 n.8 (1973), the Court reviewed the standards governing statutory presumptions and made them broadly applicable to so-called "common law inferences"—permissible inferences charged by a trial judge without specific statutory authorization.

[16] The jury in this case was charged with this definition.

many occupants who may not know they are riding with a gun (which may be out of their sight), and (2) many who may be aware of the presence of the gun but not permitted access to it. Nothing about a gun, which may be only a few inches in length (e.g., a Baretta or Derringer) and concealed under a seat, in a glove compartment or beyond the reach of all but one of the car's occupants, assures that its presence is known to occupants who may be hitchhikers or other casual passengers, much less that they have any dominion or control over it.[17] Although New York has created exceptions to the presumption for three situations in which it would be especially anomalous to infer possession—where the gun is found upon the person of one of the occupants, where the weapon is found in an automobile being operated for hire by a licensed driver, and where one of the occupants has a license to carry the weapon—the presumption remains irrational in that class of cases in which it does apply.

Indeed, this case is strikingly similar to *United States* v. *Romano, supra,* in which the Court struck down a federal presumption deeming presence near a still sufficient evidence to sustain a conviction for possession, custody or control of that still. See 26 U.S.C. § 5601(a)(1), (b) (1970) (since amended). Just as the *Romano* Court noted that presence near a still is not a wholly innocent circumstance, we would agree that the presence of a gun in a car may cast some suspicion on all of its occupants. Even so, *Romano* said

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[17] In fact, during the trial of this case, the jury was charged pursuant to parallel presumptions that they could infer that all four occupants of the car had possession of heroin and a machine gun found in the trunk of the car, see note 3, *supra,* even though a key to the trunk was never recovered from any of them. The jury acquitted all of the defendants on these counts.

> "Presence tells us only that the defendant was there and very likely played a part in the illicit scheme. . . . Presence is relevant and admissible evidence in a trial on a possession charge; but absent some showing of the defendant's function at the still, its connection with possession is too tenuous to permit a reasonable inference of guilt—'the inference of the one from proof of the other is aribtrary. . . .' *Tot* v. *United States,* 319 U.S. 463, 467." 382 U.S. at 141.

By the same token, in this case presence would be relevant and admissible evidence in a trial on a firearm possession charge. But absent some additional showing, its connection with possession is too tenuous to permit a reasonable inference of guilt.

Although we are cognizant of the sensitive nature of our function in this case, that of reviewing the constitutional validity of a state statute, and of the deference ordinarily due to legislative judgments regarding the connection between proven and presumed facts, see p. 555, *supra,* we find the State's efforts to justify this statute to be without merit. Although the State asserts that this presumption meets the *Leary* test, the only background for this statute to which we have been referred indicates that it was passed to facilitate prosecution of the alleged crime by forcing occupants of a car to come forward with evidence regarding possession and not because of any empirical association between the presumed fact and the proved fact. For example, the New York Court of Appeals' opinion in this case remarked,

> "To resolve the issue, we first look to the history underlying the statute. . . . Under traditional rules, developed in a motorless age, criminal possession of a weapon was not established unless the weapon was

'within the immediate control and reach of the accused, and where it is available for unlawful use if he so desires'. (*People* v. *Persce,* 204 N.Y. 397, 402, 97 N.E. 877, 878.) Difficulties arose when a weapon was found secreted under the seat, in the glove compartment or in the trunk of an occupied automobile. Traditional analysis precluded a finding that any of several occupants of the automobile was sufficiently close to the weapon as to be in actual possession of it. For example, in one 1930 case, the police intercepted an automobile and found a revolver under the driver's seat. The court, in applying the relevant standards, was compelled to release all defendants for failure to sufficiently establish possession. (*People ex rel. De Feo* v. *Warden,* 136 Misc. 836, 241 N.Y.S. 63.) The court remarked, however, that the case and other similar situations 'establishes the urgent need for legislation making the presence of a forbidden firearm in an automobile or other vehicle presumptive evidence of its possession by all the occupants thereof. Such an amendment would require the occupants of an automobile to explain the presence of the firearm and enable the court to fix the criminal responsibility for its possession.' (136 Misc. 836, 241 N.Y.S. 63.) In 1936, the Legislature took heed of this suggestion and enacted section 1898-a of the former Penal Law providing that all persons in an automobile at the time a weapon is found in the vehicle are presumed to be in illegal possession of the weapon. (L.1936, ch. 390.)'' 40 N.Y.2d at 509-11.

But the notion that a presumption may be created simply because defendants may have superior access to relevant evidence was abandoned in *Tot* and has never been revived. The New York Court's opinion does not assert that possession of a gun and occupancy of a car containing it are closely linked; on the contrary, the opinion notes that "traditional analysis *precluded a finding* that any of several occupants of the automobile was sufficiently close to the weapon as to be in actual possession of it." *Id.* (emphasis added). In short, nothing in the *Lemmons* decision or others upholding the presumption demonstrates that the state courts or legislature have ever attempted to justify this firearm presumption as *Leary* requires. See also *People* v. *Russo,* 278 App. Div. 98, 103 N.Y.S.2d 603, *aff'd.,* 303 N.Y. 673, 102 N.E.2d 834 (1951).[18]

Appellant's reliance on *People* v. *Terra,* 303 N.Y. 332, 102 N.E.2d 576 (1951), *app. dismissed,* 342 U.S. 938 (1952), in which the Supreme Court dismissed for lack of a substantial federal question a case in which a somewhat similar presumption—making the presence in a room of a machine gun presumptive evidence of its possession by all occupants of the room—had been upheld by the New

[18] In *People* v. *Leyva,* 38 N.Y.2d 160, 341 N.E.2d 546, 379 N.Y.S.2d 30 (1975), the New York Court of Appeals did uphold a parallel presumtion, which made the presence in a car of a controlled substance presumptive evidence of its knowing possession by all the car's occupants, N.Y. Penal L. § 220.25; see also *Leyva* v. *Superintendent,* 428 F. Supp. 1 (E.D.N.Y. 1977), and its opinion was somewhat more sensitive than *Lemmons* to the nature of the *Leary* test. Without expressing any opinion on the validity of *Leyva,* we note the following distinctions between that case and this one: First, the *Leyva* court had before it a report indicating that the New York legislature may have actually found the connection required by *Leary.* See 38 N.Y.2d at 166-67. Here, we have been shown nohing suggesting that the legislature made any such judgment. Second, the *Leyva* court adopted that report's suggestion that anyone transporting large quantities of drugs would be very unlikely to allow a person not in joint possession to accompany him. Here, a gun—while not wholly innocent—is not so incriminating that one would decline to allow those not having custody of it to ride with it. Finally, it is significant that Judge Fuchsberg, who wrote the majority opinion in *Leyva,* dissented from the New York court's decision in this case.

York Court of Appeals, is misplaced. Apart from the fact that the Supreme Court's disposition in *Terra* predated *Gainey, Romano, Leary,* and *Turner,* the case is clearly distinguishable.[19] In *Terra,* the New York court defined "persons who occupy a room" very narrowly, as encompassing only individuals "who either reside in it or use it in the conduct and operation of a business or other venture." 303 N.Y. at 335. With the class of person to whom the presumption could apply so circumscribed, the *Terra* court could rationally conclude that such people would be more likely than not to know what was in a room and enjoy sole or joint possession of its contents. By contrast, in this case, the term "persons occupying" a car extends indiscriminately to casual passengers and others with no long-term association with it. Thus, the similarity between the presumption involved in *Terra* and the one before us is more verbal than real.

Finally, contrary to the State's assertion, it makes no difference that the presumption before us is rebuttable. *Tot, Gainey, Romano, Leary,* and *Turner* all involved rebuttable presumptions. The evil of the presumptions that the Supreme Court has struck down has not been that they could not be dispelled, but rather that they forced defendants to meet inferences that could not rationally be drawn from the facts proved.

For these reasons we hold that, because it cannot be said with substantial assurance that the presumed fact (possession of a gun by occupants of an automobile) is more likely than not to flow from the proven fact (presence of the gun in the car) the New York presumption making the latter "presumptive evidence" of the former is unconstitutional on its face.

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[19] We express no opinion on whether *Terra* remains viable in view of these Supreme Court cases.

For several reasons we consider it inadvisable to limit our decision, as did the district court, to a holding that the statutory presumption at issue is unconstitutional as applied to the facts of this case. At first blush such an approach has some appeal because it would appear to enable us to avoid possible exacerbation of federal-state relations arising out of our nullification of a state statute by focusing attention narrowly on a set of specific facts, Note, The First Amendment Overbreadth Doctrine, 83 Harv. L. Rev. 844, 844-45 (1970), and requiring that we determine only whether the particular conduct before us is immune and not whether the statute could lawfully be applied to other hypothetical circumstances.

Where the empirical connection between the proved and presumed facts turns on the presence or absence of one or two clearly identifiable circumstances which were left unmentioned by the legislature, e.g., the type and amount of a drug possessed by a defendant, see *Turner* v. *United States,* 396 U.S. 398, 415-18 (1970), we have not hesitated to limit ourselves to an "as applied" holding, upholding the validity of such a statute where the condition is met, see, e.g., *United States* v. *Gonzalez,* 442 F.2d 698 (2d Cir.) (en banc) *cert. denied, sub nom. Ovalle* v. *United States,* 404 U.S. 845 (1971) (over 1 kilogram of cocaine). But when the empirical relationship between proved and presumed facts turns, as in the present case, on a variety of circumstances and on the largely unpredictable combinations in which they occur, the "as applied" approach resembles more a holding as to the sufficiency of the evidence than the "more likely than not" determination required by *Leary.*[20] Such a particularized analysis of the applicability

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[20] In *United States* v. *Tavoularis,* 515 F.2d 1070 (2d Cir. 1975), for example, this court considered the permissibility of an

(footnote continued on following page)

of a presumption would involve us in the nature and quality of the evidence required to uphold a conviction under state law—an issue which we normally eschew on consideration of habeas petitions. E.g., *Terry* v. *Henderson,* 462 F.2d 1125, 1131 (2d Cir. 1972); *United States ex rel. Griffin* v. *Martin,* 409 F.2d 1300, 1302 (2d Cir. 1969); *United States ex rel. Mintzer* v. *Dros,* 403 F.2d 42 (2d Cir. 1967), *cert. denied,* 390 U.S. 1044 (1968).[21]

With these considerations in mind we believe that it would be inappropriate for us in effect to determine whether a more narrowly drawn New York presumption, limited to a more restricted class of cases than that delineated by the state legislature, might be upheld and,

(footnote continued from preceding page)

inference that the defendants knew that treasury bills had been stolen from a bank based on their possession of those bills. The court's discussion of *Leary* and the other relevant precedents was positioned in that portion of the opinion dealing with the sufficiency of the evidence in the case. 515 F.2d at 1074-77.

[21] With due respect, Judge Timbers' characteristically thoughtful opinion tends to underestimate the nature of our reliance on these decisions. Viewed broadly, they reflect the principle that federal courts "are bound by a State's interpretation of its own statute and will not substitute [the federal court's] judgment for that of the State's when it becomes necessary to analyze the evidence for the purpose of determining whether that evidence supports the findings of a state court." *Garner* v. *Louisiana,* 368 U.S. 157, 166 (1961). If we were to adopt the solution to this case suggested by Judge Timbers, however, every prisoner to whom this presumption had been applied could effectively challenge the sufficiency of the evidence in his case by claiming that that evidence was insufficient to support the use of the presumption against him. Rather than allow the wholesale conversion of state law issues into due process questions, we have chosen to follow the Supreme Court's holdings in *Leary, Tot, Romano* and *Gainey* in deciding the validity of New York's statute on its face. These cases establish that this mode of adjudication is not limited to situations in which First Amendment values are implicated.

if so, whether the present case would fall inside or outside of the more confined area. Absent direct evidence, an inference of joint possession on the part of occupants depends on many variables, including the number of occupants of the car, the nature of the relationships between them, their ownership or past use of the automobile, their familiarity with it, the size of the vehicle and the size, location and visibility of the gun. The weight to be given to evidence of one or more of many relevant factors, moreover, would turn on the credibility extended to the proof. While we might agree with the district court in this case that the statutory presumption is unconstitutional as applied to the three petitioners, in view of the evidence that the guns (one concealed and one partially exposed) were in Doe's handbag resting on the floor between her and the right front door, we would not want to hypothesize as to which was the pivotal circumstances—the location and ownership of the bag, the position of the bag, the partial exposure of one of the guns or the number of the occupants. The fruitlessness of this approach, which bears all the earmarks of a review of evidence for sufficiency, is readily apparent. In effect the validity of the presumption would be upheld only in instances where the evidence would, independent of the statute, support an inference of possession. For this reason there would be no point in an attempt to save the statutory presumption in part by adding conditions which neither the New York legislature nor the New York Court of Appeals have chosen to supply.

Accordingly we hold that New York's presumption lacks the requisite empirical connection between proved and presumed facts in the class of cases to which the legislature made it applicable. As a result, appellees were denied a fair trial when the jury was charged that they could rely on the presumption in finding possession.

The issuance of the writs of habeas corpus by the district court is affirmed.

TIMBERS, *Circuit Judge,* concurring:

I agree that the judgment of the district court should be affirmed. But I would affirm on the ground that N.Y. Penal Law § 265.15(3) (McKinney 1976-77 Supp.) is unconstitutional *as applied.* That is the ground of Judge Owen's holding. I would not reach the issue as to whether the statute is unconstitutional on its face.

I take it that it is common ground that normally a court should scrutinize the constitutionality of a statute only as applied in the case before it. *Broadrick* v. *Oklahoma,* 413 U.S. 601, 610-12 (1973); *United States* v. *Raines,* 362 U.S. 17, 21 (1960); *Ashwander* v. *TVA,* 297 U.S. 288, 347 (1936) (Brandeis, *J.,* concurring). It is in the unusual case, such as where the very existence of a statute would chill activity protected by the First Amendment, that other principles override the normal considerations of restraint. See Note, The First Amendment Overbreadth Doctrine, 83 Harv. L. Rev. 844, 852 (1970). ("[D]eparture from the normal method of judging the constitutionality of statutes must find justification in the favored status of rights to expression and association in the constitutional scheme.") The difficulties concomitant to an analysis of the facts of a particular case should not impel us unnecessarily to reach a holding with respect to the constitutionality of a statute on its face.

The majority acknowledges that "[w]here the empirical connection between the proved and presumed facts turns on the presence or absence of one or two clearly identifiable circumstances which were left unmentioned by the legislature . . . we have not hesitated to limit ourselves to an 'as applied' holding, upholding the validity of such a statute where the condition is met. . . ." But the majority then advances what strikes me as the novel proposition that "when the empirical relationship between proved and presumed facts turns . . . on a variety of circumstances and on the . . . combinations in which they occur, the 'as applied' approach resembles more a holding as to the sufficiency of the evidence than the 'more likely than not' determination . . . ." Since the majority correctly notes that we eschew passing on the sufficiency of evidence in habeas corpus proceedings, I should have thought that we would avoid such an approach to constitutional adjudication.

With deference I suggest that the majority's reliance on this Circuit's refusal to consider the sufficiency of evidence in habeas corpus proceedings is misplaced. We have avoided consideration of claims regarding the sufficiency of evidence to uphold a state court conviction because they are "essentially . . . question[s] of state law and [do] not rise to federal constitutional dimensions." *Terry* v. *Henderson,* 462 F.2d 1125, 1131 (2 Cir. 1972); see also *United States ex rel. Griffin* v. *Martin,* 409 F.2d 1300, 1302 (2 Cir. 1969). This reluctance stems from a desire to avoid intrusion into matters properly the province of the state courts. Furthermore, it has the virtue of prudently avoiding unnecessary constitutional showdowns. In the instant case, these very considerations should stay our hand from precipitously striking down the New York presumption wholesale—the most extreme form of exacerbation of federal-state relations. See Note, The First Amendment Overbreadth Doctrine, *supra,* 83 Harv. L. Rev. at 849-52.

Finally, no protected activity would be impaired here by our allowing the presumption to operate where it may do

Appendix B—Decision of the United States Court of Appeals for the Second Circuit.

so constitutionally.[1] Any future abuse of the presumption may be remedied when and if it occurs, in which event I would be willing to do so on the basis of Judge Mansfield's thoughtful analysis of the constitutionality issue as set forth above in the majority opinion.

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[1] In its discussion of *People* v. *Terra*, pages 560-561, *supra*, the majority without ruling on the issue appears to acknowledge that in *some* situations the statutory presumption would be valid.

Appendix C—Decision of the United States District Court for the Southern District of New York, Dated April 19, 1977.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

76 Civ. 4794

SAMUEL ALLEN, RAYMOND HARDRICK and MELVIN LEMMONS,

Petitioners,

—against—

COUNTY COURT, ULSTER COUNTY, NEW YORK, WARDEN, Woodbourne Correctional Facility, Woodbourne, New York.

MEMORANDUM AND ORDER

OWEN, District Judge

Petitioners Allen, Hardrick and Lemmons were convicted on two counts of felonious possession of a gun under N.Y.Penal L. § 265.05(2)[1] in the County Court of Ulster County. They seek a writ of habeas corpus releasing them from custody[2] and setting aside their convictions. The convictions were affirmed on successive appeals, although over strong dissents.[3]

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[1] Now § 265.02(4).

[2] Petitioner Allen is on parole; petitioners Hardrick and Lemmons are presently incarcerated on unrelated charges, not yet having begun to serve their sentences on this conviction.

[3] These convictions were affirmed in 44 App. Div.2d 639, 370 N.Y.S.2d 243 (3d Dept. 1975) and 40 N.Y.2d 505, 387 N.Y.S.2d 97 (1976).

Appendix C—Decision of the United States District Court for the Southern District of New York, Dated April 19, 1977.

The three petitioners were driving in a car with one "Jane Doe," a co-defendant below, who was also convicted of possession.[4] Lemmons was driving, with Jane Doe sitting in the right front seat; Allen and Hardrick were in the back seat. When the car was pulled over for a speeding violation, one of the police officers approached the passenger side of the car. There, on the floor of the front seat between Jane Doe's feet and the right hand front door, he observed her handbag with the handle of a gun visible. Upon inspection he found a second gun in the handbag as well. Both were loaded. It is for possession of these guns that petitioners were convicted.

The State conceded on oral argument that the *only* basis for the conviction was the presumption as set forth below:[5]

> New York Penal Law § 265.15(3)
>
> The presence in an automobile . . . of any firearm . . . is presumptive evidence of its possession by all persons occupying such automobile at the time such weapon . . . is found . . . .

Petitioners moved at the close of the People's case, to dismiss both gun-possession counts for insufficient evidence, claiming the presumption did not apply to them.[6] The motion was denied and the court thereafter charged the jury as to the presumption without charging the exception.

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[4] Doe was adjudicated a youthful offender.

[5] *See also People* v. *Lemmons,* 370 N.Y.S.2d at 246 (Greenblott, J., dissenting) and 387 N.Y.S.2d at 104 (Fuchsberg, J., dissenting).

[6] Petitioners relied upon language in § 265.15(3), supra, providing that the presumption is applicable "except under the following circumstances: (a) if such weapon . . . is found upon the person of one of the occupants therein . . .

Appendix C—Decision of the United States District Court for the Southern District of New York, Dated April 19, 1977.

Petitioners now seek a writ of habeas corpus under 28 U.S.C. § 2254 on the ground, *inter alia,* that the presumption of possession in § 265.15(3) as applied to them resulted in an unconstitutional denial of due process.[7]

The test for the constitutionality of a presumption has been stated as whether "the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." *United States* v. *Leary,* 395 U.S. 6, 36 (1969). There must "be a rational connection between the facts proved and the fact presumed," or a "reasonable relationship to the circumstances of life as we know them." *Tot* v. *United States,* 319 U.S. 463, 467-68 (1943). New York courts similarly define the test. See *People* v. *McCaleb,* 25 N.Y.2d 394, 400-01 (1969).

Thus, here, was it "more likely than not" that from the mere presence of two guns in a woman's handbag, "possession" by three others in the car could be reasonably inferred? I conclude that in the circumstances of life that inference does not reasonably follow.

In addition, I note, as mentioned earlier, that in the very statute under consideration the presumption does not apply when the weapon is found "upon the person" of one of the occupants. In *People* v. *Pugash,* 15 N.Y.

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[7] There has been much discussion in the opinions in the New York Court of Appeals and in the briefs before me concerning the trial judge's failure to charge the jury on the exception to the presumption and petitioners' failure to object to the charge as given. I find that petitioners' trial strategy was in no way inconsistent with their present argument, and in view of the fact that they argued the inapplicability of the presumption to the state appellate courts, failure to object, I find, was not a "deliberate by-pass" of state procedure. *Fay* v. *Noia,* 372 U.S. 391, 439 (1963); *Kibbe* v. *Henderson,* 534 F.2d 493 (2d Cir.) *cert. granted,* 97 S.Ct. 55 (1976). However, I need not reach the charge issue since I find that petitioners' motion to dismiss after the People's case should have been granted.

Appendix C—Decision of the United States District Court for the Southern District of New York, Dated April 19, 1977.

2d 65 (1964), *cert. denied,* 380 U.S. 936, *appeal dismissed,* 382 U.S. 20 (1965), the New York Court of Appeals held that a firearm in a briefcase carried by a person was "concealed upon his person." *A fortiori,* a woman's handbag in a car within her reach is her equivalent of a man's various pockets, and normally entitled to privacy. Its contents are, therefore, necessarily "upon her person."

Having concluded that the presumption is, as a matter of law, inapplicable in this case, and there being no other evidence to support petitioners' conviction, the petition for writ of habeas corpus is granted. The writ shall issue. Submit order.

(Illegible) OWEN
United States District Judge

April 19, 1977.

Appendix D—Decision of the Court of Appeals of the State of New York, Dated July 15, 1976.

PEOPLE v LEMMONS [40 NY2d 505]

Statement of Case

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v MELVIN LEMMONS, RAYMOND HARDRICK, SAMUEL ALLEN and JANE DOE, Appellants.

Argued May 5, 1976; decided July 15, 1976

Crimes—possession of dangerous weapon—after vehicle was stopped for speeding and computer check revealed that driver was wanted by authorities of another State, he was placed under arrest for being fugitive from justice, and police officer, seeking to ascertain identity of three other occupants of vehicle, woman in front and two men in back, looked into window on passenger side, and saw woman's open handbag on floor between door and front seat, and portion of pistol protruding therefrom, whereupon passengers were placed under arrest, handbag was searched, and two loaded pistols found therein—driver and three passengers were convicted of two counts of possession of dangerous weapon—convictions were properly affirmed—validity of seizure of weapons does not depend upon legality of driver's arrest under out-of-State warrant which, in fact, had been dismissed prior to incident—weapons came into plain view of officer while he was conducting inquiry which was reasonable under circumstances—issue of whether weapons in handbag, admittedly woman's handbag, were found on her person, in which case statutory presumption that all occupants of vehicle possessed them would be inapplicable, was, in this case, question of fact for jury—although jury was never charged with respect to "on the person" exception, defense counsel did not except to this omission.

Appendix D—Decision of the Court of Appeals of the State of New York, Dated July 15, 1976.

1. Police stopped a vehicle with New York license plates for speeding and, when the driver produced an out-of-State license and no vehicle registration at all, requested a computer check, which revealed that, while the vehicle was "clean", the driver was wanted by the authorities of another State on a weapons violation. He was placed under arrest for being a fugitive from justice, and a police officer, seeking to ascertain the identity of three other occupants of the vehicle, a woman seated in the front and two men seated in the back, looked into the window on the passenger side, and saw a woman's open handbag on the floor between the door and the front seat, and a portion of a pistol protruding from that handbag, whereupon all three passengers were placed under arrest, the handbag was then searched, and two loaded pistols were found therein. Based on possessing those pistols, the driver and the three passengers were all convicted of two counts of possession of a dangerous weapon. Their convictions were properly affirmed.

2. The validity of the seizure of the two weapons does not depend upon the legality of the driver's arrest under the out-of-State warrant, which, in fact, had been dismissed a few days prior to the incident. The weapons came into the plain view of the officer while he was conducting an inquiry which was reasonable under the circumstances, and the seizure of them and subsequent arrest of the passengers were legitimate and constitutional police responses to the situation then confronted.

3. The issue of whether the weapons in the handbag, which was admittedly the woman's handbag, were found on her person, in which case the statutory presumption that all occupants of the vehicle possessed them would be inapplicable, was, in this case, a question of fact for the jury, in view of such factual issues as the precise location of the

Appendix D—Decision of the Court of Appeals of the State of New York, Dated July 15, 1976.

handbag and the access to it which the others may have had. Absent clear-cut evidence leading to the sole conclusion that it was on her person, it cannot be concluded that, as a matter of law, the statutory presumption was inapplicable.

4. Although the question of the applicability of the statutory presumption was a question for the jury, it was never charged with respect to the "on the person" exception. However, defense counsel did not except to this omission.

People v Lemmons, 49 AD2d 639, affirmed.

APPEALS, by permission of a Justice of the Appellate Division of the Supreme Court in the Third Judicial Department, from an order of said court, entered July 14, 1975, which affirmed judgments of the Ulster County Court (RAYMOND J. MINO, J.), rendered upon verdicts convicting defendants of possession of a weapon as a felony (two counts).

J. Jeffrey Weisenfeld for appellants. I. Appellants' motion to suppress the weapons should have been granted. (*United States v Robinson*, 414 US 218; *Gustafson v Florida*, 414 US 260; *United States v McDowell*, 475 F2d 1037; *People v Baer*, 37 AD2d 150; *United States v Arias*, 472 F2d 1, 414 US 864; *Whiteley v Warden*, 401 US 560; *United States v Cox*, 475 F2d 837; *United States ex rel. Mealey v State of Delaware*, 352 F Supp 349; *United States v Canieso*, 470 F2d 1224.) II. The evidence was insufficient to support the conviction of Lemmons, Hardrick and Allen. (*People v Pugach*, 15 NY2d 65, 380 US 936; *People v Davis*, 52 Misc 2d 184; *People v Garcia*, 41 AD2d 560; *Leary v United States*, 395 US 6; *People v Terra*, 303 NY 332, 342 US 938; *People v Reisman*, 29 NY2d 278; *People v De Leon*, 32 NY2d 944.) III. The court's charge on reasonable doubt requires a new trial.

Francis J. Vogt, District Attorney (Michael Kavanagh and *Edward M. P. Greene* of counsel), for respondent. I. Since the findings of the trial court and the jury were affirmed by the Appellate Division and are supported by the record, this court has not power to pass on the factual issue of the trooper's credibility. Furthermore the handguns, were properly seized under the "plain view" doctrine and no search was needed or undertaken. (*People v Maney,* 37 NY2d 229; *People v Oden,* 36 NY2d 382; *People v Leonti,* 18 NY2d 384; *People v Rowell,* 27 NY2d 691; *People v Rivera,* 14 NY2d 441; *People v Cunningham,* 26 AD2d 966; *Whiteley v Warden,* 401 US 560; *People v Lypka,* 36 NY2d 210; *People v Horowitz,* 21 NY2d 55.) II. When the unconcealed handguns were found in the car, the statutory presumption attached to all the occupants thereof and established their guilt beyond a reasonable doubt. In the circumstances of its application here, the presumption is constitutional. (*People v Pugach,* 15 NY2d 65, 380 US 936; *People v Moore,* 32 NY2d 67; *People v Sibron,* 18 NY2d 603; *People v Anthony,* 21 AD2d 666, 379 US 983; *People v Terra,* 303 NY 332, 342 US 938; *People v McCaleb,* 25 NY2d 394; *People v Reisman,* 29 NY2d 278; *People v De Leon,* 32 NY2d 944.) III. In its charge to the jury, the court properly explained the meaning of reasonable doubt. (*People v Jones,* 27 NY2d 222.)

JASEN, J. Defendants Helvin Lemmons, Raymond Hardrick, Samuel Allen and Jane Doe[1] were convicted, after a jury trial, of two counts of possession of a dangerous weapon, two loaded revolvers. The Appellate Division, with two Justices dissenting in part, affirmed the judgments of conviction, without opinion. (49 AD2d 639.) On

[1] A fictitious name for a young woman subsequently adjudicated a youthful offender.

this appeal, all four defendants argue that their motion to suppress the weapons on constitutional grounds should have been granted. In addition, defendants Lemmons, Hardrick and Allen contest the legal sufficiency of the evidence supporting their convictions. There should be an affirmance.

On March 28, 1973, the defendants were riding in a late model passenger car on the New York State Thruway. Melvin Lemmons was at the wheel, with Jane Doe beside him in the front seat and the other two defendants seated in the back. Shortly before 1:00 P.M., while the car was passing through Ulster County, it was detected speeding and a State Trooper signaled the driver to pull the car over to the right side of the road. The patrol car stopped abreast of the Lemmons vehicle on the grassy center mall on the left side of the highway. Officer John Emsing walked over to the car, approached the driver, requested his operator's license, and advised him that the officer was going to issue him a ticket for speeding. Lemmons produced a Michigan driver's license and no vehicle registration at all.[2] Since the vehicle had New York license plates, the officers followed normal procedure by requesting, over the police radio, that the Department of Motor Vehicles check on the operator's license and the car registration. In addition, the officers had their dispatcher submit the infor-

[2] At the suppression hearing, Officer Emsing testified that defendant Lemmons displayed a long since expired temporary registration. On the other hand, Officer Askew stated that no registration at all had been produced. The suppression court credited Officer Askew's version and this finding, as well as the other findings of fact made by the suppression court, were affirmed by the Appellate Division. Thus, our review is restricted to the legality of the weapons' seizure and to the sufficiency of the evidence and we may not consider defendants' arguments, addressed to alleged factual contradictions. (See, e.g., *People v Maney,* 37 NY2d 229, 233.)

mation to the National Crime Information Center computer. Although the State department reported that the vehicle was "clean", the computer check revealed that Lemmons was "wanted by the police department in Detroit, Michigan on a weapons violation". Upon receiving this information, Officer Askew, the second State policeman in the patrol car, crossed the highway, placed Lemmons under arrest for being "a fugitive from justice", brought him over to the patrol car and placed him in the back seat. Officer Askew then returned to the Lemmons vehicle in order to ascertain the identity of its three remaining occupants: "I had three other unknown people. Obviously, I have to get their names". He walked around the vehicle to the passenger's side and looked into the window. He spotted a woman's handbag on the floor of the car between the door and the front seat. A portion of a .45 caliber automaic pistol was protruding from the open handbag. The officer then placed the three passengers under arrest. A subsequent search of the handbag established that there were two loaded automatic pistols inside, the criminal possession of which all four defendants have been held accountable.

All defendants contend that the arrest of Melvin Lemmons was invalid and, since the "search" of the car was incident to his arrest, the evidence of handgun possession should have been suppressed. Reliance is placed on the fact that the Michigan warrant upon which Lemmons' arrest was predicated had been dismissed a few days prior to this incident. In our view, the validity of the seizure of the two weapons does not turn upon the legality of Lemmons' arrest under the dismissed Michigan warrant.[3] We sustain

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[3] In light of our resolution of the issue, we do not decide whether Lemmons' arrest was, in fact, valid. (See *People v Lypka*, 36 NY2d 210, 214; *People v. La Pene*, 40 NY2d 210, 223-224.)

the seizure upon the ground that the weapons came into the plain view of the State policeman as he was conducting a legitimate police inquiry.

The standard by which the constitutionality of seizure and search is measured is whether the actions of the police were reasonable in light of all the circumstances. (*Cady v Dombrowski*, 413 US 433, 448; *People v. Kreichman*, 37 NY2d 693, 697; see *People v Moore*, 32 NY2d 67, 69, cert den 414 US 1011.) Here, the seizure of the handguns was not the product of a search, for the only search ever conducted by the State Police officers was a frisk of Lemmons' person for weapons. The handguns, rather, came into the plain view of an officer conducting an inquiry that was reasonable under the circumstances. Lemmons, the driver of the car, had been apprehended speeding, did not possess a valid vehicle registration and was apparently wanted by the authorities of another State. Confronted with these facts, the officers were entitled, if not obligated, to ascertain the identity of his three traveling companions. (See *People v De Bour*, 40 NY2d 210, 218-219.) This, and no more, is what the officer sought to do. In performing his duty, the officer observed a weapon in a handbag within open view. The seizure of the bag and its contents and the subsequent arrest of the three passengers were legitimate and constitutional police responses to the situation then confronted. (See *People v Singleteary*, 35 NY2d 528; *Ker v California*, 374 US 23, 42-43;; cf. *People v Brosnan*, 32 NY2d 254, 260.)

Turning to the second issue on this appeal, the three male defendants contend that there is insufficient evidence to establish that they were in possession of the handbag containing the weapons. The fourth defendant, Jane Doe, is precluded from raising this argument because of her voluntary admission that the handbag was hers. To support the convictions of the three men, the People rely on

subdivision 3 of section 265.15 of the Penal Law which provides, insofar as it is relevant here, that the presence of a firearm in a private automobile, other than a stolen vehicle, "is presumptive evidence of its possession by all persons occupying such automobile at the time such weapon, instrument or appliance is found, except • • • if such weapon, instrument or appliance is found upon the person of one of the occupants therein". Defendants argue that the handbag of Jane Doe was a part of her person and, thus, the statutory presumption is inapplicable.

To resolve the issue, we first look to the history underlying the statute. Since the automobile is itself of relatively recent origin, it was not until the second and third decades of this century, when popular use and ownership of motorized vehicles first became widespread, that automobiles came into vogue as an instrument for the furtherance of criminal purposes. Under traditional rules, developed in a motorless age, criminal possession of a weapon was not established unless the weapon was "within the immediate control and reach of the accused and where it is available for unlawful use if he so desires". (*People* v. *Persce,* 204 NY 397, 402.) Difficulties arose when a weapon was found secreted under the seat, in the glove compartment or in the trunk of an occupied automobile. Traditional analysis precluded a finding that any of several occupants of the automobile was sufficiently close to the weapon as to be in actual possession of it. For example, in one 1930 case, the police intercepted an automobile and found a revolver under the driver's seat. The court, in applying the relevant standards, was compelled to release all defendants for failure to sufficiently establish possession. (*People ex rel. De Feo* v. *Warden,* 136 Misc 836.) The court remarked, however, that the case and other similar situations "establishes the urgent need

for legislation making the presence of a forbidden firearm in an automobile or other vehicle presumptive evidence of its possession by all the occupants thereof. Such an amendment would require the occupants of an automobile to explain the presence of the firearm and enable the court to fix the criminal responsibility for its possession." (136 Misc 836.) In 1936, the Legislature took heed of this suggestion and enacted section 1898-a of the former Penal Law providing that all persons in an automobile at the time a weapon is found in the vehicle are presumed to be in illegal possession of the weapon. (L 1936, ch 390.) Although the statute did contain a number of exceptions, the statute did not except the situation where the weapon was found on the person of one of the vehicle's occupants. This exception made its appearance much later, in 1963, when the Legislature redrafted a number of contraband-related presumptions and placed them in a single section of the old Penal Law (§ 1899). (L 1963, ch 136, § 4.) However, it should be noted that at least one court had read such an exception into the statute prior to its 1963 amendment. (See *People* v. *Logan,* 94 NYS2d 681, 684.) The "upon the person" exception was carried into the present provision of the 1967 Penal Law.

The statutory presumption establishes a prima facie case against the defendant which presumption he may, if he chooses, rebut by offering evidence. Generally, the presumption will remain in the case for the jury to weigh even if contrary proof is offered but may be nullified if the contrary evidence is strong enough to make the presumption incredible. So too, if no contrary proof is offered, the presumption is not conclusive, but may be rejected by the jury. (Cf. *People* v. *McCaleb,* 25 NY2d 394; see, also, *People* v. *Leyva,* 38 NY2d 160.)

Whether the weapons were found on the person of one of the vehicle's occupants is primarily a question of fact.

Here, there was testimony that the handbag was situated on the floor of the car in the space between the front seat and the car door. The argument that the pocketbook was a part of Jane Doe's person is not an unattractive one, given the fact that women and men in our society often use handbags and purses to carry and store personal items of many kinds and are generally held directly by the hand or arm or are placed within easy reach. However, the placement of a weapon in a handbag does not necessarily indicate that the owner of a handbag is in sole and exclusive possession of the weapon. Whether the owner of the handbag is the sole possessor of the weapon depends upon the access to the bag that others may have and whether the others have knowledge of its contents. Similar reasoning might well be applied to briefcases, shopping bags with groceries, cartons, suitcases, or the myriad of other things that people frequently carry or transport. To hold that merely because the weapons were found in a briefcase, handbag, shopping bag or carton the presumption is nullified would defeat the legislative intent and render the statute nugatory. Astute illegal possessors of weapons then would only need to carry weapons in any kind of personalized containers to successfully evade joint responsibility. There would be added difficulty, not present in this case, of ascribing ownership of the container to one of the passengers, a matter that might be resistant to proof where the container itself reveals no information to identify its owner or where the owner of the container is not present in the vehicle at the time of apprehension. Surely this kind of rationale would return the law to the early days of this century when law enforcement was easily frustrated by an automobile shell game reminiscent more of vaudeville than of the courts. To be sure, there may be circumstances

where the evidence is clearcut and leads to the sole conclusion that the weapon was found upon the person. For example, the exception would have clear application where the weapon is secreted under one person's shirt or under other items of clothing or in a pocket. (See *People v Garcia,* 41 AD2d 560; *People v Davis,* 52 Misc 2d 184 [J. Irwin Shapiro, J.].) Absent this kind of clear indication that the weapon was actually upon the person of one occupant, the question of the presumption's applicability is properly left to the trier of fact under an appropriate charge. Only the trier of fact, after hearing all the testimony and assessing the credibility of witnesses, can determine the factual issues of access and the degree to which possession is personalized. As in this case, the precise location of the container may be a critical factual issue. Although some may draw different inferences from the nature of the container and its placement, those inferences, based as they are on contested facts, are generally to be drawn by juries and not by appellate Judges.

It should be noted that defendants did seek to have the case dismissed, after the close of the People's case, on the ground that the presumption did not apply. The trial court denied the motion, apparently accepting the prosecutor's argument that the applicability of the presumption was a question of fact for the jury. However, the trial court never charged the jury with respect to the "on the person" exception. Nevertheless, the defense did not except to the absence of this language in the court's charge. As a result, what we view as a jury question was never presented to the jury and for the reasons stated we cannot conclude in this case that as a matter of law the presumption was inapplicable.

The order of the Appellate Division should be affirmed.

Appendix D—Decision of the Court of Appeals of the State of New York, Dated July 15, 1976.

JONES, J. (concurring). I agree that the order of the Appellate Division should be affirmed and the convictions of all four defendants sustained.

At the close of the People's case defense counsel moved for dismissal on the ground that the presumption of subdivision 3 of section 265.15 of the Penal Law was not applicable because the case fell within the express exception of the statute, and that in its absence there was insufficient evidence to support a conviction. The trial court denied this motion. Although the point is not pressed on the appeal to us, in my view the denial was not erroneous; whether in consequence of the exception the presumption was not available was a question later to be left to jury determination. To this extent I agree with the views expressed in the majority opinion.

At the conclusion of the entire case, however, the Trial Judge charged the jury that "upon proof of the presence [in the automobile of] the hand weapons, you may infer and draw a conclusion that such prohibited weapons were possessed by each of the defendants who occupied the automobile at the time when such instruments were found". But no reference was made in the charge to the statutory provision that the presumption would not apply "if such weapon • • • is found upon the person of one of the occupants". No exception was taken to this charge and no request was made that the charge be accurately completed. Thus, the jury was never advised of the exception and the case was submitted to and resolved by it on the basis of a blanket presumption which had become the law of the case.

Accordingly, in the procedural posture in which these verdicts of guilty were returned there can only be an affirmance.

Appendix D—Decision of the Court of Appeals of the State of New York, Dated July 15, 1976.

WACHTLER, J. (concurring in part and dissenting in part). I concur with the majority in concluding that defendant Lemmons' motion to suppress the two handguns should have been denied on the ground that the trial court found that these weapons were in "plain view". However I cannot agree that the convictions of Lemmons, Hardrick and Allen, for possession of the weapons found in defendant Doe's handbag should be affirmed.

Initially, I would note that the applicability of the presumption was put squarely in issue by the defendants. At the close of the People's case defendants, Lemmons, Hardrick and Allen, moved to dismiss the indictments on the ground that the statutory presumption of possession was negated by the uncontradicted proof that the weapons were at all times on the person of defendant Doe. Defendants strenuously contended that the handbag was her exclusive personal property and she alone exercised dominion and control over it. The record reveals that the court and the parties engaged in a lengthy colloquy on this specific point. In light of this pointed, thorough challenge to the operation of the presumption I believe that the issue was properly preserved and that the failure to object to the charge to the jury had no effect whatsoever with respect to preservation.

In my view the application of the presumption (Penal Law, § 265.15, subd. 3) arising from presence in an automobile in which a firearm is found was erroneous. The statute provides that the presence of a firearm in an automobile is presumptive evidence of its possession by all persons occupying the automobile, "except • • • if [it] is found upon the person of one of the occupants". I would conclude that, as a matter of law, the handguns in this instance were found "upon the person" of Jane Doe within the contemplation of the statute.

In order to be convicted of the crime of possession of a firearm, the People must establish beyond a reasonable doubt that the defendant had physical or constructive possession of a firearm (Penal Law, § 265.15, subd 1; § 10.00, subd 8). In instances where several individuals are involved, none of whom has clear-cut dominion over the contraband, the task of the People is particularly difficult. Nowhere is this more difficult than where the individuals are situated in a motor vehicle (*People ex rel. De Feo v Warden,* 136 Misc 836). In response to this problem the Legislature in 1936 enacted a presumption of possession applicable to all persons present in an automobile at the time a weapon is found in the vehicle (L 1936, ch 390). The purpose of this presumption was articulated in *People v Logan* (94 NYS2d 681, 683-684): "As with other presumptions, however, the presumption here being considered is a rule of necessity. It is to be invoked only if, under the circumstances involved, there is an absence of satisfactory evidence of the ultimate fact to be established, to wit: To which of the occupants is 'possession' attributable? Obviously, therefore, if the undisputed facts of any given situation establish that the gun is *actually* possessed by any *particular* individual or individuals occupying the automobile, there is then no burden under section 1898-a imposed upon the remaining occupants of such car to go forward with proof tending to refute the presumption which would otherwise attach by virtue of occupancy. The positive evidence of actual possession in such case would wholly dissipate the necessity for the invocation of the statutory presumption."

This provision was carried forward when the Penal Code was revised (L 1965, ch 1030) and was amended to provide an exception for weapons "found upon the person of one of the occupants" (Penal Law, § 265.15,

subd 3, par [a]). Constitutional challenges claiming that this presumption amounts to a denial of due process have been rejected (*People v Terra,* 303 NY 332; *People v Russo,* 278 App Div 98, affd 303 NY 673). In general, presumptions of this type are constitutional provided "based on life and life's experiences, a rational connection between the fact proved and the ultimate fact presumed may be said to exist" (*People v Terra, supra,* at p 335; *Tot v United States,* 319 US 463; *Leary v United States,* 395 US 6; *People v McCaleb,* 25 NY2d 394; *People v Leyva,* 38 NY2d 160; see, generally, McCormick, Evidence, § 313). Certainly it is rational to infer from a person's presence in an automobile that he has actual or constructive possession over a weapon found in that vehicle. However, this statement is not true when the proof at trial establishes that the weapon is in the exclusive possession of one of the occupants. So, where a weapon is discovered in a passenger's vest pocket there will flow no rational belief that the driver is in possession of that weapon.

The same analysis applies where the weapon is found in a place which is but an extension of a particular individual. Here the weapon was found in a woman's handbag which was located within her natural and easy reach and defendant Doe, who was the only woman in the vehicle, expressly admitted that it was her possession. An inference that all the occupants possessed these weapons hardly follows, naturally and rationally, from these circumstances. Common experience teaches that a woman's pocketbook is but an extension of her pockets; intended to hold items which she cannot or prefers not to keep in her clothing. As such, a woman's handbag generally contains highly personalized items exclusively controlled by the owner and is markedly different from other receptacles, like shopping bags or cartons, which in common experience do not communicate the same exclusivity as a woman's handbag. In addition, this

Appendix D—Decision of the Court of Appeals of the State of New York, Dated July 15, 1976.

situation is clearly analogous to those cases where a search of the defendant's attaché case or similar item within his exclusive control is sustained as incident to a valid arrest (e.g., *People v Weintraub*, 35 NY2d 351; *People v Pugach*, 15 NY2d 65).

Equally important is the accompanying fact that this pocketbook was positioned within the easy and natural reach of its owner; it was also literally only within her easy reach and not that of any of the other passengers. Thus it was on the floor, a not unnatural placement, and between her legs and the right-hand passenger door. It was not, for instance, between Jane Doe and one of the other occupants, either on the seat or on the floor. In this combination of critical circumstances, when there was but one woman's pocketbook and but one woman in the car, who readily acknowledged that the pocketbook was hers, I would find the statutory presumption inapplicable. Indeed, this conclusion is inescapable in light of the historical origin of this statute as formulated within due process requirements. Convictions for possession of weapons simply cannot stand solely on the strength of a presumption where the fact presumed, i.e., physical or constructive possession, does not flow rationally from the evidence presented.

Although the inapplicability of the presumption here mandates reversal, that does not end the matter. Wholly apart from the presumption the People may establish that these defendants did actually exercise dominion and control over the handguns. The presence of the weapons in the vehicle coupled with other evidence presently in this record might well furnish a basis for a jury to infer logically that these defendants constructively possessed the weapons found in her handbag. Accordingly, the orders should be modified by reversing and granting a new trial as to all defendants except Jane Doe and otherwise affirmed.

Appendix D—Decision of the Court of Appeals of the State of New York, Dated July 15, 1976.

FUCHSBERG, J. (concurring in part and dissenting in part). For the reasons stated in Judge WACHTLER's concurring opinion, my vote is also for modification. However, in view of the fact that, despite a full trial, there appears to have been no evidence of control of the guns developed other than that set forth in the several opinions on this appeal, the appropriate corrective action should be dismissal for legal insufficiency of trial evidence (CPL 470.40, subd 1; 470.20, subd 2; cf. *Stubbs v Smith*, 533 F2d 64 [OAKES, J.]).

Chief Judge BREITEL and Judges GABRIELLI and COOKE concur with Judge JASEN; Judge Jones concurs in result in a separate opinion; Judge WACHTLER concurs in part and dissents in part and votes to modify and order a new trial as to all defendants except Jane Doe in a separate opinion; Judge FUCHSBERG concurs in part and dissents in part and votes to modify and dismiss the indictment as to all defendants except Jane Doe, in another separate opinion.

Order affirmed.

Appendix E—Statute Involved:

New York Penal Law § 265.15.

§ 265.15 Presumptions of possession, unlawful intent and defacement

1. The presence in any room, dwelling, structure or vehicle of any machine-gun is presumptive evidence of its unlawful possession by all persons occupying the place where such machine-gun is found.

2. The presence in any stolen vehicle of any weapon, instrument, appliance or substance specified in section 265.05 is presumptive evidence of its possession by all persons occupying such vehicle at the time such weapon, instrument, appliance or substance is found.

3. The presence in an automobile, other than a stolen one or a public omnibus, of any firearm, defaced firearm, firearm silencer, bomb, bombshell, gravity knife, switchblade knife, dagger, dirk, stiletto, billy, blackjack, metal knuckles, sandbag, sandclub or slungshot is presumptive evidence of its possession by all persons occupying such automobile at the time such weapon, instrument or appliance is found, except under the following circumstances: (a) if such weapon, instrument or appliance is found upon the person of one of the occupants therein; (b) if such weapon, instrument or appliance is found in an automobile which is being operated for hire by a duly licensed driver in the due, lawful and proper pursuit of his trade, then such presumption shall not apply to the driver; or (c) if the weapon so found is a pistol or revolver and one of the occupants, not present under duress, has in his possession a valid license to have and carry concealed the same.

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1554

COUNTY COURT ULSTER COUNTY, NEW YORK; WOODBOURNE CORRECTIONAL FACILITY, WOODBOURNE, NEW YORK,

Petitioners,

against

SAMUEL ALLEN, RAYMOND HARDRICK and MELVIN LEMMONS,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 28, 1978
CERTIORARI GRANTED OCTOBER 2, 1978

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Chronological List of Relevant Docket Entries.

October 28, 1976 —Petition for Writ of Habeas Corpus filed

October 28, 1976 —Petitioners' Appendix filed

December 7, 1976 —Memorandum of law in opposition to Writ of Habeas Corpus and photocopy of trial transcript filed

January 3, 1977 —Petitioners' memorandum of law filed

January 17, 1977 —Respondents' supplementary Memorandum of Law filed

April 21, 1977 —Memorandum and Order granting writ of Habeas Corpus (OWEN, J.) filed

April 28, 1977 —Order setting aside convictions and releasing petitioners from custody filed (OWEN, J.)

May 23, 1977 —Respondents' notice of appeal fled

November 29, 1977—Opinion and Order of the Court of Appeals for the Second Circuit filed

February 1, 1978 —Orders denying petition for rehearing containing a suggestion that the action be heard *en banc*

Petition for a Writ of Habeas Corpus, filed United States District Court, October 28, 1978.

Judge Owen

76 Civ. 4794

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SAMUEL ALLEN, RAYMOND HARDRICK and MELVIN LEMMONS,

Petitioners,

against

COUNTY COURT, ULSTER COUNTY, NEW YORK, WARDEN, Woodbourne Correctional Facility, Woodbourne, New York,

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The relator, J. Jeffrey Weisenfeld, on behalf of petitioners, Samuel Allen, Raymond Hardrick and Melvin Lemmons, respectfully represents:

1. Petitioners, Samuel Allen, Raymond Hardrick and Melvin Lemmons, in County Court, County of Ulster, were each convicted of two counts of possession of a gun as a felony (within the Southern District of New York).

On June 28, 1974, Hardrick and Allen were sentenced to seven years imprisonment on each count, said sentences to run concurrently (Mino, J.) Allen has been paroled, after serving more than two years of his sentence.

On August 22, 1974, petitioner Lemmons was sentenced to seven years imprisonment on each count; sentences to run concurrently (Mino, J.) These sentences are to begin upon the completion of a ten year sentence imposed upon Lemmons in an unrelated Federal case in the District of Michigan.

Petition for Writ of Habeas Corpus, filed United States District Court, October 28, 1978.

Hardrick is presently incarcerated upon an unrelated Federal case. His sentence on this conviction is to begin upon completion of his Federal sentence.

Timely notice of appeal were filed on behalf of all the petitioners and on July 2, 1975, the Appellate Division Third Department affirmed the judgment of conviction without a written opinion. Two justices concurring in part and dissenting in part in a written opinion (opinion annexed as Exhibit "A").

On August 6, 1975, Hon. Louis M. Greenblott, granted leave to appeal to the Court of Appeals and a timely notice of appeal was filed August 19, 1975.

In an opinion dated July 15, 1976, the Court of Appeals (Wachtler and Fuchsberg, J., dissenting) affirmed the order of conviction (opinion annexed as Exhibit "B").

2. Petitioners petition for a writ of habeas corpus on the ground that the statutory presumption of possession (§ 265.15(3) P.L.) is unconstitutional on its face and as applied to them.

3. On May 8th to May 14th, 1974, a jury trial was held before Hon. Raymond J. Mino. All the petitioners were convicted of two counts of possession of a weapon. The only pertinent facts are those which relate to those weapons.

All petitioners and Jane Doe, a co-defendant below, were driving in an automobile on the New York State Thruway (references are to the appendix in the State Court of Appeals annexed hereto as Exhibit "C") (A172). The automobile was stopped for a speeding violation (A169). The driver of the automobile, Lemmons, was arrested on the basis of an alleged Michigan warrant (A190).

After the arrest of Lemmons, Officer Askew returned to Lemmons vehicle (A192). Lemmons had been driving. Doe was in the front passenger's seat, and Allen and Hardrick

were in the rear (A192). As he approached the car, Askew walked around the front of the vehicle to the passenger's side (A192). He testified that he saw a pocketbook with a portion of a gun showing, lying on the floor of the front seat, between Doe and the door (A192, 213, 204-205). This pocketbook was seized and it was discovered to contain two guns. The pocketbook contained documents relating to Doe and when asked if the pocketbook were hers, she admitted that it was (A205). The guns formed the basis of the conviction of petitioners.

After the People's case, defense counsel moved to dismiss the charges; specifically, it was pointed out that the weapons in question were found "upon the person" of Doe and for this reason, the statutory presumption under Section 265.15 did not apply. The motion was denied.

At the end of the entire case, the Court charged the jury as follows:

> Our Penal Law also provides that the presence in an automobile of any machine gun or of any handgun or firearm which is loaded is presumptive evidence of their unlawful possession.
>
> In other words, these presumptions or this latter presumption upon proof of the presence of the machine gun and the hand weapons, you may infer and draw a conclusion that such prohibited weapon was possessed by each of the defendants who occupied the automobile at the time when such instruments were found. The presumption or presumptions is effective only so long as there is no substantial evidence contradicting the conclusion flowing from the presumption, and the presumption is said to disappear when such contradictory evidence is adduced.
>
> To prove their accusations beyond a reasonable doubt, the People here introduced evidence—and I am going to very briefly outline it—to establish the stopping of the automobile on the Thruway; that the automobile was occupied by the four defendants at the time the automobile was stopped; that two concealable weapons or handguns were found in the purse of one of the defendants which was either on the front seat or on the floor in the front of the automobile; and that thereafter a search of the trunk disclosed a machine gun and the heroin. (A362-363).

Petitioners, Allen, Hardrick and Lemmons moved to have the verdict set aside on the ground of insufficient evidence. This motion was denied.

4. The only evidence in this case pertaining to the charge for which Allen, Hardrick and Lemmons were convicted was that two guns were found in Doe's pocketbook. This pocketbook was found on the floor of the car near where Doe had been sitting.

Under these circumstances, the conviction of Allen, Hardrick and Lemmons for possession of these weapons cannot stand.

First, under the very terms of the statute, Section 265.15 (3) P.L., no presumption can arise where the weapon is found on the person of a particular party. Here, the possession of the guns can only be attributed by Doe. These weapons were found in her pocketbook. A woman's pocketbook is clearly on her person and numerous cases have, in analogous circumstances, so held. For example, in *People* v. *Pugach,* 15 N.Y. 2d 65 (1964), cert. denied 380 U.S. 936, the Court of Appeals upheld the "frisk" of defendant's briefcase even after it had been taken from defendant and was in possession of a police officer. The Court stated:

> The fact that the loaded gun was found concealed in the brief case, rather than in a pocket of defendant's

> clothing, affords no grounds for saying that this "frisk" was in reality a constitutionally protected search. The loaded firearm concealed in the brief case carried in the hands of the defendant was in the language of the statute "concealed upon his person" (Penal Law Section 1897). (The predecision to § 265.15 P.L.) Id. at 69.

People v. *Moore,* 32 N.Y. 2d 67, 71 (1973) ("frisk" of defendant's handbag permitted). See *People* v. *Bowles,* 29 A.D. 2d 996 (3d Dept., 1968) ("frisk" of defendant's trousers which were on the floor of defendant's room).

It is clear that contraband contained in the handbag of one of the passengers of an automobile is contraband "concealed upon the person" of that occupant and that occupant alone. The mere fact that at the time of the discovery and seizure Doe was not physically holding her bag is not significant.

In *Pugach,* the discovery was made after the police had custody of the briefcase. In *Moore,* the same is so of the handbag, and in *Bowles,* the same is true of the trousers. *People* v. *Davis,* 52 Misc. 2d 184, 185 (Sup.Ct. Queens Co., 1966); *People* v. *Desthers,* 343 N.Y. 2d 887 (Crim.Ct., City of N.Y., N.Y.Co. 1973); *People* v. *Garcia,* 41 A.D. 2d 560 (2d Dept., 1973); *People* v. *Rivera,* N.Y.L.J. 9/18/74 p. 17 col. 6 (Special Narcotics Courts, N.Y.C., 1974).

Doe was the only woman in the automobile, the pocketbook was seen between her leg and the door immediately prior to the seizure. When questioned Doe admitted ownership. Moreover, there were documents in the purse which indicated Doe's ownership. Under these circumstances, the presumption set out in Section 265.15 cannot arise as to Allen, Hardrick and Lemmons.

Second, if the presumption is applicable here, then it is unconstitutional both on its face and as applied.

In *Leary* v. *United States,* 395 U.S. 6 (1969), the Supreme Court held that a presumption must be regarded as "irrational" or "arbitrary" and hence unconstitutional, unless it can be said with substantial assurance that the presumed fact is more likely than not to flow from the proven fact upon which it is made to depend. Id. at 36.

The New York test has been held to basically conform to that set out in *Leary;* though the actual language is somewhat different (i.e., "based on life and life's experiences", there is a "fair", "natural" and "rational" connection between the fact proved and the fact to be presumed or inferred). *People* v. *McCaleb,* N.Y. 2d 394, 400-401 (1969); *People* v. *Terra,* 303 N.Y. 332, 335 (1951) app. dism'd 342 U.S. 938; *People* v. *Reisman,* 29 N.Y. 2d 278, 286 (1971).

Under the circumstances of this case, there is absolutely no basis upon which to find that possession by petitioners of these guns is more likely than not to flow from the finding of these guns within the automobile. An attack upon the constitutionality of the presumption was made in *Stubbs* v. *Smith,* —— F.2d —— (2d Cir. 1976) slip.op. p. 2913 (4/2/76). The Court there found it unnecessary to determine the issue of the constitutionality of the presumption. The Court found that since the petitioner was convicted of an assault with the gun, there was a basis for the conviction of possession of the gun independent of the presumption. Therefore, even if the presumption was unconstitutional, the error was harmless.

Such is not the case here, where the conviction was based entirely upon the use of the presumption. See *People* v. *DiLandri,* 250 App.Div. 52 (1st Dept., 1937). Thus, the validity of the presumption is clearly at issue. The majority opinion in the New York Court of Appeals goes into the history and necessity of the statutory presumption, but paid no attention at all to articulating the rational connec-

tion between the proven and presumed facts. Ease of conviction is no substitute for the required rational connection.

Further, in *Mullaney* v. *Wilbur,* 421 U.S. 684 (1975) the Supreme Court indicated that in some instances, at least, affirmative defenses which shift the burden of proof are a violation of due process. Evidently, the Court understood full well that there is a significant interplay between affirmative defenses and presumptions; that an affirmative defense can be phrased as a presumption and vice versa (e.g. It shall be a crime to be in a car with a gun; but it is an affirmative defense that the gun was on the person of one of the occupants. Or, it is illegal to possess a gun. All persons found in a car with a gun are presumed to possess it unless it is found upon the person of one of the occupants). With this interplay in mind, the Supreme Court reiterated the requirement of a rational connection between proven and presumed facts. Id. at 702 n.31. However, the Court did not comment on a circumstance such as here, where the trier of fact is required to find possession and possession is the crime charged. Here, the operation of the presumption is no mere procedural device shifting only the burden of production. Here, there is a virtual shift in the burden of persuasion. See, *Byrd* v. *Hopper,* —— F.Supp. —— (U.S.D.C., N.Ga.1975); 18 CrL. 2148.

At the very least, *Mullaney* requires a hard look at statutory presumptions to make sure they are rational. This statutory presumption is invalid on its face for there is no rational connection between a gun being in a car and possession by each occupant. This presumption now permits a passenger to be convicted of possession of a gun found in a locked trunk or glove compartment of the car. Such a presumption cannot stand.

Even if the presumption were constitutional on its face, it is clearly unconstitutional as applied. These guns were

found in Doe's handbag, which was between her leg and the door of the front passenger's seat. The pocketbook had Doe's papers in it and Doe admitted it was her bag. Lemmons was out of the car at the time of the seizure and Hardrick and Allen were in the rear of the car. The New York Court of Appeals, in its opinion, states absolutely no reasons why there is a sufficient rational connection between the finding of the gun and the possession by petitioners. This absence in the majority opinion results from there being no rational connection between the guns in the pocketbook and possession by all the occupants.

5. The charge of the trial court denied petitioners due process in that it failed to charge a necessary element of the crime; namely, that the conviction could only be had if the jury found that the guns in question were not upon Doe's person. So too, the charge was improper in that it made no mention of scienter, but relied upon the presumption. *People* v. *Robledo,* N.Y.L.J. 9/27/76, p.21 c.4 (Sup. Ct.N.Y.Co.). The failure to object to the charge or raise the issue in the State Court does not preclude relief in the Federal Courts, since there was no deliberate by-pass, there being no tactical reason for the failure to object. *Kibbie* v. *Henderson,* —— F.2d —— (2d Cir., 1970) slip.op. 75-2128 p. 3081 (4/8/76) cert. granted —— U.S. —— (1976).

6. The petitioners were convicted on less than proof of guilt beyond a reasonable doubt. Even if the presumption set out in § 265.15 is constitutional and applicable here, the conviction was still had upon less than a finding of guilt beyond a reasonable doubt. Here, the necessary element of scienter or mens rea is not supplied by the presumption. The presumption merely supplies constructive possession and not mens rea and therefore, petitioners here were improperly and unconstitutionally convicted. *People* v. *Ro-*

Petition for Writ of Habeas Corpus, filed United States District Court, October 28, 1978.

bledo, N.Y.L.J. 9/27/76 p.21 c.4 (Sup.Ct., N.Y.Co.); *In re Winship,* 397 U.S. 358 (1970); cf. *Mullaney* v. *Wilbur,* 421 U.S. 684 (1975).

In the trial court, petitioners' counsel moved to dismiss the charges and to set aside the verdict on the grounds that the evidence of guilt was insufficient. The argument in the Appellate Division and the Court of Appeals was phrased in the same language. Thus, the issue was clearly preserved for the Federal Courts. In any event, there was no deliberate by-pass of the issue. *Kibbie* v. *Henderson, supra.*

7. Petitioners have exhausted their state remedies.

WHEREFORE, petitioners pray that the Writ be granted and an order be entered reversing the judgments of conviction, discharging them from custody and for such other and further relief which may to the Court seem just and proper.

Dated: New York, N. Y.
October 26, 1976

J. JEFFREY WEISENFELD
J. JEFFREY WEISENFELD

(Verified, October 26, 1976.)

Excerpt from Trial Transcript (pp. 415, 547-556). Colloquy—Respondents' Motion to Dismiss Indictment —May 13, 1974.

(415) STATE OF NEW YORK

COUNTY COURT

COUNTY OF ULSTER

THE PEOPLE OF THE STATE OF NEW YORK,

—against—

MELVIN LEMMONS, RAYMOND HARDRICK, SAMUEL ALLEN and MARCELLA MURPHY,

Defendants.

Stenographic transcript of proceedings held in the above-entitled matter on the 13th day of May, 1974, at a Regular Term of County Court, held in and for the County of Ulster, at the Ulster County Court House, Kingston, New York, before the HON. RAYMOND J. MINO, County Judge, presiding, and a jury.

APPEARANCES:

HON. ELLEN G. DONOVAN
Assistant District Attorney
Appearing for the People

EWIG, KLEIN & KLEIN, Esqs.
Attorneys for Defendant
Melvin Lemmons
65 John Street
Kingston, New York

By: AARON E. KLEIN, Esq.,
of Counsel.

Excerpt from Trial Transcript (pp. 415, 547-556). Colloquy—Respondents' Motion to Dismiss Indictment—May 13, 1974.

(547) Miss Donovan: Yes, Your Honor. I think that what Mr. Goldberger is doing is arguing facts that are more properly heard by a jury. There has been testimony she was in the car, that—

The Court: He said you didn't prove—

Miss Donovan: I feel we did.

The Court: What did you prove?

Miss Donovan: We placed her in the car with these other three defendants.

The Court: Other than that what did you prove?

Miss Donovan: Proved that she was armed with at least two guns.

The Court: I am not talking about that. I am talking about what was found in the trunk.

Miss Donovan: Your Honor, I would rely on the presumption.

The Court: That's all you proved, that she was a passenger in the car.

Miss Donovan: That's right.

The Court: Therefore the presumption was she—

Miss Donovan: Has knowledge.

(548) The Court: That's the basis of your contention?

Miss Donovan: Yes, Your Honor.

The Court: I will deny your motion at this time, Mr. Goldberger.

Mr. Klein: We are going in the order as we sit across the counsel table. On behalf of the defendant Melvin Lemmons I join in the general motion to dismiss this case on the grounds that as to him the People have failed to make out a prima facie case, and more specifically—

The Court: In that?

Mr. Klein: More specifically I would like in his case to do a little analysis of what we have here. The presumption

Excerpt from Trial Transcript (pp. 415, 547-556). Colloquy—Respondents' Motion to Dismiss Indictment—May 13, 1974.

statute on firearms, 265.13, does not include the weapon as a firearm known here as People's Exhibit 7-A.

The Court: What weapon is that?

Mr. Klein: Pardon?

The Court: What is 7-A?

Mr. Klein: 7-A is this weapon, the large weapon.

The Court: The semi-automatic gun?

(549) Mr. Klein: Right. The statute does not extend a presumption to possession of that weapon by all of the occupants of the car.

The Court: What section?

Mr. Klein: 265.15 of the Penal Law. The only time it does apply is when it is a stolen. The only time the presumption of being in an automobile applies to all of the occupants of the car is negated is by certain exceptions such as where the weapon is found upon the person of one of the other occupants of the car. In this case the proof adduced by the Prosecution is that a car was stopped, Mr. Lemmons is the operator of the car, he is told he is going to get a ticket and he can mail it in and he waits as the trooper goes back, presumedly fills in a ticket. The trooper than comes back to the car, asks Mr. Lemmons, without arresting him then and there, to accompany him back to the patrol car, and at the patrol car an arrest is made.

Now, the weapons are found on the person of one of the other parties in a handbag belonging to one of those other parties. I see no way, with (550) all due respect, to extend the presumption in a case like that to this defendant, and I respectfully ask that count one of the indictment be dismissed as to the defendant Lemmons.

The Court: Count one has to do with the weapon?

Mr. Klein: That is the weapon.

Mr. Goldberger: There is at least two counts, I would believe, for the two guns in the purse.

Excerpt from Trial Transcript (pp. 415, 547-556). Colloquy—Respondents' Motion to Dismiss Indictment—May 13, 1974.

Mr. Klein: There are two separate counts.

Miss Donovan: There are three. Count one—

The Court: Count one is not a weapon.

Mr. Klein: I am sorry. Let's do it right. I am sorry. I don't have it in my hand. The possession of a dangerous weapon under 265.05 is the second count, and it also applies to the third count and the fourth count.

The Court: Your motion now is to dismiss which count?

Mr. Klein: Well, I made a motion on the count which includes the .45. First of all I will (551) take count 265.05, Subdivision 2—that is the possession of a .45 automatic pistol loaded with ammunition found in the possession or on the person of another occupant of the vehicle, particularly at a time when the defendant Lemmons wasn't even in the vehicle and he had long since been placed under arrest.

The Court: Long since? I thought it was a matter of minutes.

Mr. Klein: A considerable time before.

The Court: Go ahead.

Mr. Klein: I also press that same motion regarding the fourth count which is a .38 caliber revolver also found on the very self same person, according to the testimony.

The Court: Miss Donovan, do you wish to address the Court as to those two motions to dismiss the third and fourth count of the indictment as to Lemmons?

Miss Donovan: Yes, Your Honor. I feel that the fact that the guns were admittedly found in the purse, were not actually in the defendant Murphy's hands—I feel that it is a question of (552) fact how the guns got there, who put them there.

The Court: He is saying that the only proof you have again is your presumption; right?

Miss Donovan: Correct.

Excerpt from Trial Transcript (pp. 415, 547-556). Colloquy—Respondents' Motion to Dismiss Indictment—May 13, 1974.

The Court: He was in the car, and the statute presumes. You have no other proof?

Miss Donovan: Right.

The Court: The guns were in the car. Denied. Denied.

Mr. Klein: Denied. Now, the other count to be specific is count two which is possession of a machine gun under 265.05, Subdivision 1. I already stated that a presumption does not extend to such a weapon under that statute or under the statute 265.15.

The Court: Well, I don't have a Penal Law with me right now, but I was under the impression it did. If you are correct, I will have to examine it. That's all. You say it does?

Miss Donovan: I believe it does. I don't have a copy of the Penal Law with me either.

The Court: Just a minute. Miss Donovan says it does. I was under the impression it did, but (553) I am not sure. In other words, you are contending that that is a machine gun, that there is no presumption prescribed by statute; is that correct?

Mr. Klein: Yes, that extends to that type of gun.

The Court: Machine gun.

Mr. Klein: Now, I also move the dismissal of the first count of the indictment which charges the possession, criminal possession of a dangerous drug in the first degree, violation of Section 220.23 on the ground there has been no connection made as between the defendant Melvin Lemmons and any dangerous drug in the trunk of the vehicle based upon the whole evidence, the incredibility of the whole evidence, the unacceptability of the whole evidence regarding possession or constructive possession in the trunk of the vehicle.

The Court: On those grounds I will deny your motion.

Mr. Klein: And then I have a blanket motion, and

Excerpt from Trial Transcript (pp. 415, 547-556). Colloquy—Respondents' Motion to Dismiss Indictment—May 13, 1974.

that is that the entire search and seizure here was illegal and that the four charges in this information all are based upon the fruits (554) of an illegal search and seizure and that all four charges should be dismissed on that ground.

The Court: Denied.

Mr. Torraca: Your Honor, on behalf of the defendants Hardrick and Allen I likewise join in the previous motions made by my two colleagues on behalf of Lemmons and/or Marcella Murphy. In addition, to wit: I move this court to dismiss count three involving the .45 automatic pistol and count four involving the .38 caliber revolver, that there is no proof in the record that the defendants Hardrick and Allen were in possession of these particular weapons. The weapons at all times were on the person of another subject in the vehicle.

The Court: My recollection of the testimony is that they were in her purse.

Mr. Klein: Well, the purse being part of the person, Your Honor, similar—

The Court: I am aware of that. In other words, you are contending that if I carry a satchel around, it is part of my person? If I put it on the floor, it is still part of my person; is that correct?

(555) Mr. Torraca: If you put it on the floor of the car, it is somewhat different, but if it is in a pocketbook belonging to a person, it is not in the car itself.

The Court: That is your interpretation; right?

Mr. Torraca: Right, yes, sir.

The Court: Based upon that you say they have not proved even with the presumption that your clients were in possession of any handguns?

Mr. Torraca: Well, not only with the presumption, there is no proof in the case at all.

Excerpt from Trial Transcript (pp. 415, 547-556). Colloquy—Respondents' Motion to Dismiss Indictment—May 13, 1974.

The Court: So I thought there was proof, one, there was a car, that there were four people in the car, that they found two guns in the car. I think that is proof of something. There is a presumption.

Mr. Torraca: Proof of the presumption—

The Court: It is not proof of the presumption.

Mr. Torraca: My clients exercised no dominion or control over the purse that was on the person of the other subject. The statute was (556) intended when a weapon is in a glove compartment or in the car itself but not on the person—

The Court: I am aware of what the statute was intended for, but there seems to be a question in my mind whether or not "on the person" means a purse; not in the physical control or possession, you know.

Mr. Torraca: Well, possession could be in your belt; it could be in your pocket; but when it is in a purse or portfolio—

The Court: On that basis I will deny your motion.

Mr. Torraca: In addition, I move that the first and second count be dismissed as to the defendants Hardrick and Allen in that again there is no proof in this case other than these items in these respective counts were in a locked trunk that Hardrick and Allen, as well as the others, had no dominion, exercised no dominion or control over the articles in that trunk. Just a bold presumption that exists. That was never the intent of the statute for that purpose.

The Court: What was the intent?

Excerpt from Summation to the Jury by Counsel to Jane Doe (Tr. 619-624), May 14, 1974.

(619) Let me get now to the two guns in the purse. The purse hers? Yes. The guns? No. The last thing in the world that I would want to do or that I would want you to think that I was doing was trying to con you because, Good Lord, I am not going to suffer from this. If you think that I am a kind of a shyster or con man that is trying to fool around with you and play hocus-pocus with you, you will take it out on her and not on me. I don't want you to do that. The purse is hers, the guns are not, and I think I can prove it to you.

Facts. Emsing went over to the car when he first stopped the car. He flagged it down. He looked—his testimony is that he looked in the window when he was talking to Lemmons. Emsing did not see a purse or any guns. All right? He did see some clothing in the back and some other things, but he did not see, although he testified as a (620) trained observer—he did not see the purse. All right. Possible?

Emsing goes back to the troop car. They are going to write the ticket. Askew comes back and gets Lemmons. Askew comes back with Lemmons. I brought out carefully to this jury—you may have thought I was a madman. I brought out carefully to this jury that there were time hiatuses in between. The officers testified two, three, four minutes from when Emsing went back to the car, when Askew went back and got Lemmons and put him under arrest. Their eyes were not, they testified, always on the defendants, the other three defendants in the car. All right. Time hiatus, two, three, four minutes.

The position when Askew says—and I will go with Askew's testimony. I don't think it is truthful in regard to how he saw it, but I will go with it. Assume the worse, okay? Assume it is a hundred per cent true. Mr. Klein can have a field day with that, but I don't care about that. I will assume it is true.

Excerpt from Summation to the Jury by Counsel to Jane Doe (Tr. 619-624), May 14, 1974.

We went through a demonstration as to how those guns were in the purse. I believe that (621) you all remember that the gun was in the purse in the sense that the .38 was crossways, keeping the purse open, and the .45 was on top. I am going to just ask you to be fair. Do the guns appear—they are all in evidence; you can take them in the jury room with you, and you can look at them, and I want you to go through the demonstration yourself. Does it appear to you, as it does to me, that the guns were jammed into this thing pretty quickly by somebody? Because, if they are Marcella Murphy's guns and they were in the purse all along—and assume the worse, that the purse was open. What did Miss Murphy have to do during that period? She shuts the purse. There can't be any search of the car unless he sees the guns from outside. If they are Miss Murphy's guns, and assuming she has them all along and assuming she has decided to keep it open, when Emsing and Askew and Lemmons are back at the other car, what would she do unless she is intending to take out the cannons and blow away the police officers? She does this (indicating). Remember, I had Askew do it. Case closed. Can't go in the purse then because you can't see anything from out- (622) side.

I want you to take these guns into the jury room. She was 16 then. Do you think these two cannons belonged to her? Listen, I am the first one to say it looks bad. I mean, the guns are in her purse. What are we supposed to do? But if we didn't need jurors, if we need robots, there wouldn't be anything for you to analyze. There wouldn't be any reason for you to be sifting what was going on.

Wouldn't she have zipped the purse if they were her guns? Why would she leave the purse open when Askew was coming around; whether he had his gun drawn or not, I don't remember. If she wanted to hide the fact she had two

Excerpt from Summation to the Jury by Counsel to Jane Doe (Tr. 619-624), May 14, 1974.

guns, that they are her two guns, that she is Two-Gun Annie, why wouldn't she just go like this (indicating) and zip it closed? She had absolutely no control over those two guns, and she didn't put them in that purse. I am not going to tell you who did, but use your judgment as to where the guns came from and whose guns they were.

Factors which mitigate against them being (623) her gun is the size of the guns. These are cannons. A .45 automatic is a cannon; so is a .38. I am not saying it is impossible for a 16-year-old girl—I am not saying it is impossible for her to have had that gun or two guns. The weight of the guns—you remember, the weight of these guns is less now than it would be if you put the clip and the bullets in them. I don't know exactly how much they weigh. I am not a gun expert, all right, but it would be even heavier. Take the guns into the jury room and feel them.

And most important of all, I think the main factor in showing you why the guns are not hers is that there is two of them. There is two guns. She is going to carry two guns in her purse? Assuming she is a gun-toting 16-year-old kid, she is going to carry two of them? Isn't one of them enough?

The guns came from somebody else, and in the hiatus period when everybody is back at the car and seeing Lemmons is getting arrested, there isn't any question about it—I don't think there is in your minds, if you are fair—somebody (624) stuffed the guns in her purse because the purse probably is the safest place; right? Lady's purse, young girl's purse, maybe the last place to look except when the guns went in there, she probably didn't know it or was so darned excited about it that she didn't even zip the purse closed.

Can you ask yourselves and examine your own minds and hearts and say to yourselves, "I believe that those two guns

Excerpt from Summation to the Jury by Counsel to Respondents Hardrick and Allen (Tr. 653-655), May 14, 1974.

are Marcella's" or do you believe they belong to somebody else in the car? And do you realize how they got into—you have to go from one little thing to the next, you know. It would be very easy for this jury just to say, "Look, I don't want to hear from that lawyer. He can go to hell. The guns are in the purse, and she is going for the guns." There won't be anything I can do if you want to go that route, but be a little thoughtful in your examination about the way they were jammed in there. She didn't put the guns in there; they are not her guns.

Excerpt from Summation to the Jury by Counsel to Respondents Hardrick and Allen (Tr. 653-655), May 14, 1974.

(653) One more thing. You know, different people live in different cultures and different societies. You may think that the way Hardrick has his hair done up is unusual; it may seem strange to you. People live differently. You saw the acting judge here the other day from Onteora, the young kid; his (654) hair was in an Afro style, too, wasn't it? It is not unusual. You have to understand this is the nature of the people. Sometimes people do other things. For example, if you were living under their times and conditions and you traveled from a big city, Detroit, to a bigger city, New York City, it is not unusual for people to carry guns, small arms to protect themselves, is it? There are places in New York City policemen fear to go. But you have got to understand; you are sitting here as jurors. These are people, live flesh and blood, the same as you, different motives, different objectives.

The small arms were in the pocketbook, it is true. The question is, who did they belong to? If you think that Hardrick and Allen had exercised dominion and control over the weapons in the purse, then follow the law as the Judge gives it to you on the presumption of what was in the purse as to all four or three or two or one.

Is it reasonable to assume that the purse being in the front seat that one of the guns belonged to Lemmons? There is no proof that my two men put these guns into the pocketbook. There is no proof (655) at all. It is only conjecture, and you may very well conjecture that way, but, importantly, there is no evidence that Hardrick and Allen had knowledge of what was in that trunk, and if you are going to rely and convict on the type of investigation that the police conducted in this case, you are going to have to take a strong and hard line.

Excerpts from Trial Transcript (pp. 729-730; 734-737; 742-746; 749-760; 765-766).
Charge to Jury.

(729) The Court: Ladies and gentlemen of the jury, we now come to that part of the case, as I mentioned yesterday, where the Court must charge the jury as to the law of this case so that you may apply that law to the facts as you find them during your deliberations.

I must inform you at the very outset that in this case, as in every other case that comes into (730) a court of this jurisdiction, you have one province, and I have another. Yours is the province of the fact; mine, as the Court, is the province of the law. According to our system of justice, it is provided that the Court decides all questions of law

which arise in the course of the trial and that I must charge you, as members of this jury, on all matters of law which I think necessary for your information in reaching a verdict.

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(734) Under our law, every defendant in a criminal trial starts the trial with the presumption in his favor that he is innocent, and this presumption follows him throughout the entire trial and remains with him until such time as you, by your verdict, find him or her guilty beyond a reasonable doubt or innocent of the charge. If you find him or her not guilty, then, of course, this presumption ripens into an established fact. On the other hand, if you find him or her guilty, then this presumption has been overcome and is destroyed.

Our law provides also that the burden of proving the defendant's guilt rests upon the shoulders of the People, and such guilt must be established beyond a reasonable doubt before any (735) conviction can result. This burden never shifts. In other words, it rests upon the shoulders of the People through the entire trial and never shifts to the shoulders of the defendant. The defendant at no time is ever called upon to establish his innocence or to prove any defense whatsoever. It is the burden of the People to establish to your satisfaction beyond a reasonable doubt—each of your satisfactions—that these defendants committed the crimes they were accused of having committed. If they have proved this to you to your satisfaction, that is the burden of the People. As I said before, the defendants do not have to prove anything.

• • •

You have heard the term "reasonable doubt" mentioned here many times, particularly during the course of the selec-

Excerpts from Trial Transcript (pp. 729-730; 734-737; 742-746; 749-760; 765-766).
Charge to Jury.

tion of the jury. As you probably know, our law provides that in criminal (736) cases the norm of proof is reasonable doubt because our law provides that in case of a reasonable doubt, whether the guilt of a defendant is satisfactorily shown, he is entitled to an acquittal. That simply means that if a juror entertains a doubt as to the guilt of the defendant, it must be such a doubt for which the juror could give a reasonable explanation if he were requested to do so. It must be a doubt founded on common sense, one for which the juror could reasonably and logically account. A reasonable doubt is what the words themselves imply—a doubt founded in reason. It is not a mere whim, a guess or surmise, nor is it a mere subterfuge to which resort may be had to avoid doing a disagreeable thing. It is such a doubt as a reasonable man may entertain after a careful and honest consideration and review of the evidence. It must be founded in reason and must survive the test of reasoning or the mental process of reasonable examination.

Our law, in substance, provides that the People must prove the guilt of a defendant in a criminal case beyond a reasonable doubt. Our law does not say that the People must prove the guilt of (737) a defendant beyond a doubt based in reason. It does not say that the People must prove the guilt of a defendant beyond all doubt. Reasonable doubt may arise from the evidence itself, as you heard it from the lips of the witnesses here, or from a lack of evidence.

• • •

(742) As I said before, these are what I consider to be possessory crimes. Possession, as defined in our Penal Law, mean to have physical possession or otherwise to exercise dominion and control over tangible property such as we have here—the drugs, the machine gun and the two handguns. As so defined, possession means actual physical

Excerpts from Trial Transcript (pp. 729-730; 734-737; 742-746; 749-760; 765-766).
Charge to Jury.

possession, just as having the drugs or the weapsons in one's hand, in one's home or other place under one's exclusive control, or constructive possession which may exist without personal dominion over the drugs or weapons but with the intent and ability to retain such control or dominion.

• • •

(743) Our Penal Law also provides that the presence in an automobile of any machine gun or of any handgun or firearm which is loaded is presumptive evidence of their unlawful possession.

In other words, these presumptions or this latter presumption upon proof of the presence of the machine gun and the hand weapons, you may infer and draw a conclusion that such prohibited weapon was possessed by each of the defendants who occupied the automobile at the time when such instruments were found. The presumption or presumptions is effective only so long as there is no substantial evidence contradicting the conclusion flowing from the presumption, and the presumption is said to disappear when such contradictory evidence is adduced.

To prove their accusations beyond a reasonable doubt, the People here introduced evidence—and I am going to very briefly outline it—to establish the stopping of the automobile on the Thruway; that the automobile was occupied by the four defendants at the time the automobile was stopped; that two concealable weapons or handguns (744) were found in the purse of one of the defendants which was either on the front seat or on the floor in the front of the automobile;

• • •

(745) Now, in order to find any of the defendants guilty of the unlawful possession of the weapons, the machine

Excerpts from Trial Transcript (pp. 729-730; 734-737; 742-746; 749-760; 765-766).
Charge to Jury.

gun, the .45 and the .38, you must be satisfied beyond a reasonable doubt that the defendants possessed the machine gun and the .45 and the .38, possessed it as I defined it to you before. I want to emphasize that insofar as the guns are concerned, the mere possession of the machine gun, the .45 and the .38 is the essence of the crime of illegal possession, and guilty knowledge of such possession or (746) an intent to illegally possess such machine gun and other weapons is not a necessary element of the crime with which these defendants are charged.

Accordingly, you would be warranted in returning a verdict of guilt against the defendants or defendant if you find the defendants or defendant was in possession of a machine gun and the other weapons and that the fact of possession was proven to you by the People beyond a reasonable doubt, and an element of such proof is the reasonable presumption of illegal possession of a machine gun or the presumption of illegal possession of firearms, as I have just before explained to you.

There is a difference in the presumption insofar as the dangerous drug is concerned. The presumption says, "presumed knowing possession." Insofar as the weapons is concerned, all you need is possession, and then the presumption says it is illegal.

• • •

(749) (The following proceedings were held outside of the presence of the jurors.)

The Court: Are there any exceptions to the charge by the Prosecution?

Miss Donovan: No, Your Honor.

The Court: By Defense?

Mr. Goldberger: Yes, Judge. Just one second. I believe these exceptions are taken on behalf of all of the defend-

Excerpts from Trial Transcript (pp. 729-730; 734-737; 742-746; 749-760; 765-766).
Charge to Jury.

ants. First of all, I except to Your Honor's use of the word and the term "innocence" in regard to a jury verdict. On at least two occasions the Court used the term "innocent." The term should not be used.

The Court: Guilty or not guilty you mean, right?

(750) Mr. Goldberger: Secondly, I except to the fact that the Court did not charge the jury on the question of reasonable doubt that they have to find the defendant guilty beyond a reasonable doubt and for a moral certainty. The term "moral certainty" was not used by the Court.

Thirdly, I except to the fact that when the Court charged that the jury must not go outside of the evidence that it failed to immediately qualify that by saying "but of course may consider the lack of evidence in the case."

I fourthly except to the Court's improper explanation of the stipulation. I think the Court confused the stipulation. I think what the Court did by explaining the stipulation was that it inferred guilt of the defendants through that stipulation.

The Court: Will you expound on that?

Mr. Goldberger: I don't recall exactly what the Court said with regard to the stipulation, but I think the Court said that we stipulated that the guns were possessed unlawfully. We have never stipulated to that.

(751) The Court: I thought you did.

Mr. Goldberger: No. We only stipulated to the fact that the guns were operable.

The Court: Is there any contention they were unlawfully possessed?

Mr. Goldberger: There is a great contention that these defendants did not unlawfully possess the guns.

• • •

Mr. Goldberger: I also except to the fact (752) that the Court did not charge that contradictory evidence need not

be affirmative evidence but may be in the form of negative evidence or lack of evidence. I also except to the fact that the Court has not charged at least as of yet—and I request the Court to do so—that if there is a conflict among the members of the jury with regard to any item of fact, particularly the one item of fact totally in dispute here as to the clothes in the trunk of the car, that they be allowed to reread, have that portion of the testimony reread to them.

The Court: You maintain the Court must charge that?

Mr. Goldberger: I maintain the Court must charge that they have a right to reread the testimony if there is a conflict among the members of the jury.

I also except to the fact that in regard to the portion of the Court's charge dealing with weapons that the Court did not charge knowledge on the part of the defendant with regard to the possession of a weapon must be proved, not the mere possession.

The Court: Did you listen to my charge?

(753) Mr. Goldberger: Yes, I did.

The Court: You say I didn't say they had to prove knowledge?

Mr. Goldberger: In regard to the weapon part of the charge, it is my belief that the Court stated there was a difference in the presumptions; in that regard to the weapons they just had to prove possession.

The Court: The weapons, that's correct; and that's the law.

Mr. Goldberger: Well, I except to that. I don't agree that that is the law.

Mr. Klein: I have one further exception to make. I presume my colleagues join with me. The Court in marshalling the facts—

The Court: I didn't marshal any facts.

Mr. Klein: Well, the Court in whatever exposition of facts was given stated that it was the contention of the Prosecution that the handbag containing hadguns was either on the seat or on the floor. This is not only not their contention, it was contrary to the indictment in this case.

The Court: I don't understand that. What (754) do you mean? Please explain. I said very clearly that the testimony was it was either on the seat or on the front floor. Wasn't that a fact?

Mr. Klein: I say the indictment here is based not on an "either or."

The Court: When does it say in the indictment?

Mr. Klein: The indictment is based upon the Grand Jury testimony.

The Court: It says here "they possessed it." That is all they say in the indictment. I can't understand you.

Mr. Klein: I know that, on the basis of the Grand Jury testimony, and there is only one theory in the testimony.

The Court: What is the theory?

Mr. Klein: The testimony of the Grand Jury was that it was on the seat of the car, not either on the seat or the floor.

The Court: Suppose the jury finds it was on the floor; does that do away with the indictment?

Mr. Klein: I am only asking in fairness—

The Court: In fairness of what?

(755) Mr. Klein: That there is not an "either or" proposition in this case.

The Court: I am sorry. I don't understand you. Mr. Torraca?

Mr. Torraca: Mr. Goldberger and Mr. Klein expressed them, and I join in the motion.

The Court: What motion?

Excerpts from Trial Transcript (pp. 729-730; 734-737; 742-746; 749-760; 765-766).
Charge to Jury.

Mr. Torraca: All the motions Mr. Goldberger made.
The Court: There are no motions before me.
Mr. Torraca: Well, the requests to charge.
The Court: There is only one request that I have.
Mr. Goldberger: All the others were exceptions.
Mr. Torraca: Exceptions.
The Court: Well, I want the record to be clear. I think I will bring the jury back to clarify that stipulation because I thought that the stipulation said that the possession was unlawful possession.
Mr. Goldberger: Absolutely not. The only (756) thing that stipulation says is that the drugs were heroin and that the guns were operable and that if the experts were called that they would so testify.
The Court: Is that correct, Miss Donovan?
Miss Donovan: Yes.
The Court: All right. Bring the jury back.
(The jury returned to the Courtroom, and the following proceedings were had:)
The Court: Counsel were nice enough while you were out to call to my attention a portion of my charge which needs some clarification because I was under the impression that the stipulation which I mentioned during the course of my charge said something that apparently it did not say.

• • •

(757) I come back to the stipulation relative to the weapons where again I said that I was under (758) the impression that the stipulation also said that the possession of the weapons was illegal or unlawful. I am sorry. I said that they had stipulated, one, it was a machine gun; two, that the firearms were loaded. One was a .45 caliber, and the other was a .38 caliber, and I thought the stipulation said that they didn't have the right to possess it or their possession was unlawful. Apparently the stipulation did not say that.

Excerpts from Trial Transcript (pp. 729-730; 734-737; 742-746; 749-760; 765-766).
Charge to Jury.

I charge you that it is unlawful or illegal for a person to have in his possession a machine gun. It is unlawful or illegal for a person to have in his possession any loaded firearms unless that person has a license to carry those loaded firearms or unless that person comes under one of the exemptions in the Penal Law permitting the having of machines guns—for instance, the army can have machine guns; that does not violate the statute—or permitting the possession of loaded firearms.
And I charge you that under the facts of this case, as developed here during this trial, the (759) defendants do not come under any of the exemptions in the Penal Law authorizing the possession of machine guns or loaded firearms.
I assume there are exceptions to that charge?
Mr. Goldberger: I still at this point have to except to Your Honor's explanation. I still don't think it is the proper—
The Court: All right. You have excepted.
Mr. Goldberger: Yes.
The Court: Everybody else joins; is that right?
Mr. Goldberger: Yes, they do.
The Court: Are there any requests by the People?
Miss Donovan: Only as submitted yesterday, Your Honor. I submitted one matter.
The Court: I think I covered that in my charge. Now, are there any requests by the Defense?
Mr. Goldberger: I submitted one this morning.
The Court: As set forth in Defendant Murphy Exhibit B?
(760) Mr. Goldberger: It applies to all defendants, Judge.

Excerpts from Trial Transcript (pp. 729-730; 734-737; 742-746; 749-760; 765-766).
Charge to Jury.

The Court: I will charge that request. The presumption or presumptions which I discussed with the jury relative to the drugs or weapons in this case need not be rebutted by affirmative proof or affirmative evidence but may be rebutted by any evidence or lack of any evidence in the case.

Mr. Klein: May it please the Court, I did make a request for an additional charge during the absence of the jury.

The Court: It is news to me.

Mr. Goldberger: Concerning the rereading.

Mr. Klein: The rereading of testimony.

The Court: I am not going to grant the request.

Mr. Klein: I didn't understand you made a decision.

The Court: I didn't know it was a request. It was an exception, not a request.

Swear the bailiffs.

(The bailiffs were duly sworn.)

• • •

(765) (Whereupon, at 12:10 p.m., the jury again retired to enter upon further deliberation. At 12:30 p.m., the jury was taken to lunch and returned therefrom at 2:00 p.m. and again entered upon their deliberations, and at 3:45 p.m. the jury returned to the Courtroom, and the following proceedings were had:)

(766) The Court: Call the roll.

(A roll call of the jurors showed all jurors present.)

The Court: Let the record indicate the presence of the defendants in the Courtroom together with their respective attorneys. I have here a request from the jury which reads as follows: "In the event the jury cannot reach agreement on one or more counts but is in agreement on the other counts, does this result in a hung jury on all counts?"

The answer to that question is, "No, it does not." Does that answer your question?

Affirmation of Joseph Torraca and Memorandum of Law in Support of Respondents' Motion to Set Aside the Verdict (June 3, 1974).

The Foreman: Yes, Your Honor.

The Court: Any exceptions to that charge?

Mr. Goldberger: No, Your Honor.

Mr. Torraca: No.

Miss Donovan: No.

(Whereupon, at 4:47 p.m., the jury again retired to enter upon their deliberations and at 5:45 p.m. returned and rendered the following verdict:)

Affirmation of Joseph Torraca and Memorandum of Law in Support of Respondents' Motion to Set Aside the Verdict (June 3, 1974).

STATE OF NEW YORK
COUNTY COURT—COUNTY OF ULSTER

PEOPLE OF THE STATE OF NEW YORK,

—against—

MELVIN LEMMONS, RAYMOND HARDRICK and SAMUEL ALLEN,

Defendants.

AFFIRMATION

JOSEPH TORRACA, being an attorney duly admitted to practice in the Courts of this State, under penalty of perjury, affirms as follows:

1. I am the attorney for Raymond Hardrick and Samuel Allen.

Affirmation of Joseph Torraca and Memorandum of Law in Support of Respondents' Motion to Set Aside the Verdict (June 3, 1974).

2. Pursuant to an agreement reached with Aaron Klein, attorney for Melvin Lemmons, this motion is being submitted on behalf of the three above-named defendants.

3. Defendants move for an order setting aside the verdict on the grounnd that the evidence was insufficient as a matter of law and that the resort to the presumption set out in § 265.05 was improper both statutorily and constitutionally. The reasons therefore are set out with more particularity in the memorandum of law annexed to and thereby made a part of this motion.

WHEREFORE, defendants respectfully request that the verdict of guilty be set aside and the indictment dismissed or in the alternative that they be granted a new trial.

Dated: New Paltz, New York
June 3, 1974.

Joseph Torraca
JOSEPH TORRACA

Affirmation of Joseph Torraca and Memorandum of Law in Support of Respondents' Motion to Set Aside the Verdict (June 3, 1974).

MEMORANDUM OF LAW

The only evidence in this case pertaining to the charge for which defendants Lemmons, Hardrich and Allen were convicted was that two guns were found in defendant Murphy's pocketbook. This pocketbook was found on the floor of the car near where Murphy had been sitting.

Under these circumstances, the conviction of Lemmons, Hardrich and Allen for possession of these weapons cannot stand.

First, under the very terms of the statute, § 265.15 P. L., no presumption can arise where the weapon is found on the person of a particular party. Here, the possession of the guns can only be attributed to Murphy. These weapons were found in her pocketbook. A woman's pocketbook is clearly on her person and numerous cases have, in analogous circumstances, so held. For example in *People* v. *Pugach*, 15 N.Y. 2d 65 (1964), cert. denied, 380 U.S. 936, the Court of Appeals upheld the "frisk" of defendant's brief case even after it had been taken from defendant and was in possession of a police officer. The Court stated:

> The fact that the loaded gun was found concealed in the brief case, rather than in a pocket of defendant's clothing, affords no ground for saying that this "frisk" was in reality a constitutionally protected search. The loaded firearm concealed in the brief case carried in the hands of the defendant was in the language of the statute "concealed upon his person" (Penal Law, § 1897). Id. at 69.[1]

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[1] It should be noted that § 1897 is the predecessor to § 265.

People v. *Moore,* 32 N.Y.2d 67, 71 (1973) ("frisk" of defendant's handbag permitted). See, *People* v. *Bowles,* 29 A.D. 2d 996 (3d Dept., 1968) ("frisk" of defendant's trousers which were on the floor of defendant's room).

It is clear, that contraband contained in the handbag of one of the passengers of an automobile is contraband "concealed upon the person" of that occupant and that occupant alone. The mere fact that at the time of the discovery and seizure Murphy was not physically holding her bag is not significant.

In *Pugach,* the discovery was made after the police had custody of the brief case.

In *Moore,* the same is so of the handbag.

In *Bowles,* the same is true of the trousers.

See, *People* v. *Davis,* 52 Misc. 2d 184, 185 (Sup. Ct., Queens Co., 1966); *People* v. *Desthers,* 343 N.Y.2d 887 (Crim. Ct. City of N.Y., N.Y. Co., 1973); *People* v. *Garcia,* 41 A.D. 2d 560 (2d Dept., 1973).

Moreover, Murphy was the only woman in the automobile and the pocketbook was seen between her leg and the door immediately prior to the seizure.

Under those circumstances the presumption set out in § 265.15 cannot arise as to Lemmons, Hardrich or Allen.

Second, if the presumption is applicable here, then it is unconstitutional as applied.

In *Leary* v. *United States,* 395 U.S. 6 (1969), the Supreme Court held that a presumption must be regarded as "irrational" or "arbitrary", and hence unconstitutional, unless it can be said with substantial assurance that the presumed fact is more likely than not to flow from the proven fact upon which it is made to depend. Id. at 36.

The New York test has been held to conform to that set out in *Leary*; though the actual language is somewhat dif-

ferent (i.e. "based on life and life's experiences", there is a "fair", "natural" and "rational" connection between the fact proved and the fact to be presumed or inferred). *People* v. *McCaleb,* 25 N.Y.2d 394, 400-401 (1969); *People* v. *Terra,* 303 N.Y. 332, 335 (1951) app. dism'd. 342 U.S. 938; *People* v. *Reisman,* 29 N.Y.2d 278, 286 (1971).

Assuming that the presumption is constitutional on its face (*People* v. *De Leon,* 32 N.Y.2d 944 (1973)), it is clearly unconstitutional as applied. There can be no "substantial assurance" that a defendant in a car is more likely than not to know what is on the person of other occupants of the car.[2] *State* v. *Lewis,* 225 ATL. 2d 582, 584 (Superior Ct., of New Jersey, App. Div., 1966). In the practice commentary to § 220.25 (dealing with possession of drugs in an automobile) Messrs. Denzer and McQuillan state:

> While thus broadening the automobile presumption in one respect, the revised section narrows it in another with the logical limitation that it does not apply where "the drug is concealed upon the person of one of the occupants" (cf. former Penal Law § 1751(4)). *In that situation, no sound basis exists for presuming possession by any of the other occupants;* yet in the absence of the indicated proviso, the former provision was rigidly construed as not allowing of any exception in such cases (*People* v. *Potter,* 1956, 4 Misc.2d 796, 162 N.Y.S.2d 439). Apart from the inherent injustice of that proposition, it was inconsistent with a similar provision of the former Penal Law dealing with weapons found in automobiles, which expressly excluded such cases from the scope of the presumption (§ 1899 (3a);

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[2] Even though, technically, the possessions of those in the car are "contents" of the car.

Affirmation of Joseph Torraca and Memorandum of Law in Support of Respondents' Motion to Set Aside the Verdict (June 3, 1974).

see, also, Revised Penal Law § 265.15(3a)). (emphasis supplied)

Without resort to the presumption, the evidence is totally insufficient to sustain the conviction. *People* v. *Di Landri,* 250 App. Div. 52 (1st Dept., 1937).

> It cannot be held with any degree of certainty that the revolver which was found on the floor of the car belonged to the defendant or was in his constructive possession rather than in the possession of one of the other occupants of the car. The defendant's guilt, therefore, was not established beyond a reasonable doubt. Id. at 52.

People ex rel. De Feo v. *Warden of City Prison,* 136 Misc. 836 (Sup. Ct. Kings Co., 1930) (and cases cited therein).

In fact, the statutory presumption was enacted in 1936 to meet this difficulty. *People* v. *Rogan,* 94 N.Y.S.2d 681, 683 (Sup. Ct., Kings Co., 1949).

Or as the Appellate Division, First Department stated:

> Before enactment of § 1898-a of the Penal Law (now superseded by Penal Law, §§ 1899, 1900),[3] mere presence in an automobile of a pistol and several persons was insufficient to establish constructive possession of the pistol by any of the persons. *People* v. *Anthony,* 21 A.D.2d 666 (1st Dept., 1964).

In conclusion, it is apparent that the statutory presumption set out in § 265.15 cannot apply to those who were merely occupants of this car. This is so both statutorily and constitutionally. Without this presumption there can be no legal conviction of Lemmons, Hardrich or Allen.

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[3] Now superseded by § 265.15 P. L.

Excerpt from Respondents' Brief to the Appellate Division, Third Department.

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION—THIRD DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

—against—

SAMUEL ALLEN, RAYMOND HARDRICH, MELVIN LEMMONS and MARCELLA MURPHY,

Defendants-Appellants.

Preliminary Statement

In County Court, County of Ulster, appellants Melvin Lemmons, Raymond Hardrich, Samuel Allen and Marcella Murphy were each convicted of two counts of possession of a gun as a felony.

On June 28, 1974, Defendants Hardrich and Allen were sentenced to seven years imprisonment on each count, said sentences to run concurrently (Mino, J.).

On August 22, 1974, Appellant Lemmons was sentenced to seven years imprisonment on such count; sentences to run concurrently. Appellant Murphy was sentenced to probation (Mino, J.).

Timely notices of appeal were filed on behalf of all the appellants.

Excerpt from Respondents' Brief to the Appellate Division, Third Department.

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POINT II

The evidence was insufficient to support the conviction of Lemmons, Hardrich and Allen

The only evidence in this case pertaining to the charge for which defendants Lemmons, Hardrich and Allen were convicted was that two guns were found in defendant Murphy's pocketbook. This pocketbook was found on the floor of the car near where Murphy had been sitting.

Under these circumstances, the conviction of Lemmons, Hardrich and Allen for possession of these weapons cannot stand.

First, under the very terms of the statute Section 265.16 P.L., no presumption can arise where the weapon is found on the person of a particular party. Here, the possession of the guns can only be attributed by Murphy. These weapons were found in her pocketbook. A woman's pocketbook is clearly on her person and numerous cases have, in analogous circumstances, so held. For example, in *People* v. *Pugach*, 15 N.Y. 2d 65 (1964), cert. denied 380 U.S. 936, the Court of Appeals upheld the "frisk" of defendant's brief case even after it had been taken from defendant and was in possession of a police officer. The Court stated:

> The fact that the loaded gun was found concealed in the brief case, rather than in a pocket of defendant's clothing, affords no grounds for saying that this "frisk" was in reality a constitutionally protected search. The loaded firearm concealed in the brief case carried in the hands of the defendant was in the language of the statute "concealed upon his person" (Penal Law Section 1897). Id at 69[19]

People v. *Moore*, 32 N.Y.2d 67, 71 (1973) ("frisk" of defendant's handbag permitted). See *People* v. *Bowles*, 29

Excerpt from Respondents' Brief to the Appellate Division, Third Department.

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In *Pugach*, the discovery was made after the police had custody of the brief case. In *Moore*, the same is so of the handbag. In *Bowles*, the same is true of the trousers. *People* v. *Davis*, 52 Misc. 2d 184, 185 (Sup. Ct., Queens Co. 1966); *People* v. *Desthers*, 343 N.Y.2d 887 (Crim. Ct., City of N.Y., N.Y. Co. 1973); *People* v. *Garcia*, 41 A.D.2d 560 (2d Dept. 1973); *People* v. *Rivera*, N.Y.L.J. 9/18/74 p. 17 Col. 6 (Special Narcotics Court, N.Y.C., 1974).

Moreover, Murphy was the only woman in the automobile and the pocketbook was seen between her leg and the door immediately prior to the seizure.

Under those circumstances the presumption set out in Section 265.15 cannot arise as to Lemmons, Hardrich and Allen.

Second, if the presumption is applicable here, then it is unconstitutional as applied.

In *Leary* v. *United States*, 395 U.S. 6 (1969), the Supreme Court held that a presumption must be regarded as "irrational" or "arbitrary", and hence unconstitutional, unless it can be said with substantial assurance that the presumed fact is more likely than not to flow from the proven fact upon which it is made to depend. Id. at 36.

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[19] It should be noted that Section 1897 is the predecessor to Section 265 P.L.

Excerpt from Respondents' Brief to the Appellate Division, Third Department.

The New York test has been held to conform to that set out in *Leary;* though the actual language is somewhat different (i.e. "based on life and life's experiences", there is a "fair", "natural" and "rational" connection between the fact proved and the fact to be presumed or inferred). *People* v. *McCaleb,* N.Y.2d 394, 400-401 (1969); *People* v. *Terra,* 303 N.Y. 332, 335 (1951) app. dism'd 342 U.S. 938; *People* v. *Reisman,* 29 N.Y.2d 278, 286 (1971).

Assuming that the presumption is constitutional on its face, *People* v. *De Leon,* 32 N.Y.2d 944 (1973), it is clearly unconstitutional as applied. There can be no "substantial assurance" that a defendant in a car is more likely than not to know what is on the person of other occupants of the car[20] *State* v. *Lewis,* 225 A.D.2d 582, 584 (Superior Ct., of New Jersey, App. Div., 1966). In the practice commentary to Section 220.25 (dealing with possession of drugs in an automobile) Messrs. Denzer and McQuillan state:

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[20] Even though, technically, the possession of those in the car are "contents" of the car.

Excerpt from Respondents' Brief to the Appellate Division, Third Department.

> ons found in automobiles, which expressly excluded such cases from the scope of the presumption (Section 1899 (3a)) (Emphasis supplied).

See, also, Revised Penal Law Section 265.15 (3a).

Without resort to the presumption, the evidence is totally insufficient to sustain the conviction. *People* v. *Di Landri,* 250 App. Div. 52 (1st Dept., 1937)

> It cannot be held with any degree of certainty that the revolver which was found on the floor of the car belonged to the defendant or was in his constructive possession rather than in the possession of one of the other occupants of the car. The defendant's guilt, therefore, was not established beyond a reasonable doubt. Id. at 52.

People ex rel. De Feo v. *Warden of City Prison,* 136 Misc. 836 (Sup. Ct., Kings Co., 1930) (and cases cited therein); *People* v. *Rivera,* N.Y.L.J. 9/18/74 p. 17 col. 6 (Spec. Narc. Ct., NY Co., 1974).

In fact, the statutory presumption was enacted in 1936 to meet this difficulty. *People* v. *Rogan,* 94 N.Y.S. 2d 681, 683 (Sup. Ct., Kings Co., 1949).

Or as the Appellate Division, First Department stated:

> Before enactment of Section 1898-a of the Penal Law (now superseded by Penal Law, Sections 1899, 1900),[21] mere presence in an automobile of a pistol and several persons was insufficient to establish constructive possession of the pistol by any of the persons. *People* v. *Anthony,* 21 A.D. 2d 666 (1st Dept., 1964).

[21] Now superseded by Section 265.15 P.L.

Excerpt from Respondents' Brief to the Appellate Division, Third Department.

In conclusion, it is apparent that the statutory presumption set out in Section 265.15 cannot apply to Lemmons, Allen or Hardrich. This is so both statutorily and constitutionally. Without this presumption there can be no legal conviction of Lemmons, Hardrich or Allen. Even if there had been evidence outside the presumption to sustain the conviction,[22] the conviction still cannot be sustained. The Court charged the jury on the presumption and Lemmons, Hardrich and Allen are entitled, at the very least, to a new trial.

[22] An example of this would be if Appellants' fingerprints had been found on these guns. The presumption would not apply but there would still be evidence of possession.

To be argued by:
J. JEFFREY WEISENFELD
Time: 25 minutes

Excerpt from Respondents' Brief to the New York Court of Appeals.

Court of Appeals

STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

against

SAMUEL ALLEN, RAYMOND HARDRICH,
MELVIN LEMMONS and JANE DOE,

Defendants-Appellants.

APPELLANTS' BRIEF

GOLDBERGER, FELDMAN & BREITBART
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New York, New York
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J. JEFFREY WEISENFELD
On the Brief

Excerpt from Respondents' Brief to the New York Court of Appeals.

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Court of Appeals

STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

against

SAMUEL ALLEN, RAYMOND HARDRICH, MELVIN LEMMONS and JANE DOE,

Defendants-Appellants.

APPELLANTS' BRIEF

Preliminary Statement

In County Court, County of Ulster, appellants Melvin Lemmons, Raymond Hardrich, Samuel Allen and Jane Doe* were each convicted of two counts of possession of a gun as a felony. Subsequently the conviction of Doe was replaced by a youthful offender, adjudication.

On June 28, 1974, Hardrich and Allen were sentenced to seven years imprisonment on each count, said sentences to run concurrently (Mino, J.).

On August 22, 1974, Appellant Lemmons was sentenced to seven years imprisonment on such count; sentences to run concurrently. Appellant Doe was sentenced to probation (Mino, J.).

* Fictitious name.

Excerpt from Respondents' Brief to the New York Court of Appeals.

Timely notices of appeal were filed on behalf of all the appellants and on July 2, 1975, the Appellate Division Third Department affirmed the judgment of conviction without a written opinion. Two justices concurring in part and dissenting in part in a written decision.

On August 6, 1975, Hon. Louis M. Greenblott, granted leave to appeal to the Court of Appeals and a timely notice of appeal was filed August 19, 1975.

Issues Presented

1. Whether the motion to suppress should have been granted?

2. Whether the testimony of officer Askew supporting a finding of "plain view," was incredible as a matter of law?

3. Whether the evidence that two guns were found in the pocket book of appellant Doe was sufficient to sustain the conviction of the other appellants?

4. Whether the trial court's charge on reasonable doubt requires a new trial?

• • • •

POINT II

The evidence was insufficient to support the conviction of Lemmons, Hardrich and Allen.

The only evidence in this case pertaining to the charge for which defendant Lemmons, Hardrich and Allen were convicted was that two guns were found in defendant Doe's pocketbook. This pocketbook was found on the floor of the car near where Doe had been sitting.

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Excerpt from Respondents' Brief to the New York Court of Appeals.

First, under the very terms of the statute Section 265.16 P.L., no presumption can arise where the weapon is found on the person of a particular party. Here, the possession of the guns can only be attributed by Doe. These weapons were found in her pocketbook. A woman's pocketbook is clearly on her person and numerous cases have, in analogous circumstances, so held. For example, in *People* v. *Pugach,* 15 N.Y. 2d 65 (1964), cert. denied 380 U.S. 936, the Court of Appeals upheld the "frisk" of defendant's brief case even after it had been taken from defendant and was in possession of a police officer. The Court stated:

> The fact that the loaded gun was found concealed in the brief case, rather than in a pocket of defendant's clothing, affords no grounds for saying that this "frisk" was in reality a constitutionally protected search. The loaded firearm concealed in the brief case carried in the hands of the defendant was in the language of the statute "concealed upon his person" (Penal Law Section 1897). Id at 69.[16]

People v. *Moore,* 32 N.Y.2d 67, 71 (1973) ("frisk" of defendant's handbag permitted). *See People* v. *Bowles,* 29 A.D. 2d 996 (3d Dept., 1968) ("frisk" of defendant's trousers which were on the floor of defendant's room).

It is clear, that contraband contained in the handbag of one of the passengers of an automobile is contraband "concealed upon the person" of that occupant and that occupant alone. The mere fact that at the time of the discovery and seizure Doe was not physically holding her bag is not significant.

In *Pugach,* the discovery was made after the police had custody of the brief case. In *Moore,* the same is so of the handbag, and in *Bowles,* the same is true of the trousers. *People* v. *Davis,* 52 Misc. 2d 184, 185 (Sup. Ct., Queens

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[16] Section 1897 is the predecessor to Section 265 P.L.

Excerpt from Respondents' Brief to the New York Court of Appeals.

Co. 1966); *People* v. *Desthers,* 343 N.Y.2d 887 (Crim. Ct., City of N.Y., N.Y. Co. 1973); *People* v. *Garcia,* 41 A.D. 2d 560 (2d Dept. 1973); *People* v. *Rivera,* N.Y.L.J. 9/18/74 p. 17 Col. 6 (Special Narcotics Court, N.Y.C., 1974).

Doe was the only woman in the automobile, the pocketbook was seen between her leg and the door immediately prior to the seizure. When questioned Doe admitted ownership. Moreover, there were documents in the purse which indicated Doe's ownership. Under these circumstances the presumption set out in Section 265.15 cannot arise as to Lemmons, Hardrich and Allen.

Second, if the presumption is applicable here, then it is unconstitutional as applied.

In *Leary* v. *United States,* 395 U.S. 6 (1969), the Supreme Court held that a presumption must be regarded as "irrational" or "arbitrary", and hence unconstitutional, unless it can be said with substantial assurance that the presumed fact is more likely than not to flow from the proven fact upon which it is made to depend. Id at 36.

The New York test has been held to conform to that set out in *Leary;* though the actual language is somewhat different (i.e., "based on life and life's experiences", there is a "fair", "natural" and "rational" connection between the fact proved and the fact to be presumed or inferred). *People* v. *McCaleb,* N.Y.2d 394, 400-401 (1969); *People* v. *Terra,* 303 N.Y. 332, 335 (1951) app. Dism'd 342 U.S. 938; *People* v. *Reisman,* 29 N.Y.2d 278, 286 (1971).

Assuming that the presumption is constitutional on its face, *People* v. *De Leon,* 32 N.Y.2d 944 (1973), it is clearly unconstitutional as applied. There can be no "substantial assurance" that a defendant in a car is more likely than not to know what is on the person of other occupants of the car.[17] *State* v. *Lewis,* 225 A.D.2d 582, 584 (Superior

[17] Even though, technically, the belongings of those in the car are "contents" of the car.

Excerpt from Respondents' Brief to the New York Court of Appeals.

Ct., of New Jersey, App. Div., 1966). In the practice commentary to Section 220.25 (dealing with possession of drugs in an automobile) Messrs. Denzer and McQuillan state:

> While thus broadening the automobile presumption in one respect, the revised section narrows it in another with the logical limitation that it does not apply where "the drug is concealed upon the person of one of the occupants" (cf. former Penal Law Section 1751 (4)). *In that situation, no sound basis exists for presuming possession by any of the other occupants;* yet in the absence of the indicated proviso, the former provision was rigidly construed as not allowing of any exception in such cases (*People* v. *Potter,* 1956, 4 Misc. 2d 796, 162 N.Y.S. 2d 439). Apart from the inherent injustice of that proposition, it was inconsistent with a similar provision of the former Penal Law dealing with weapons found in automobiles, which expressly excluded such cases from the scope of the presumption (Section 1899 (3a)) (Emphasis supplied).

See, also, Revised Penal Law Section 265.15 (3)(a).

Without resort to the presumption, the evidence is totally insufficient to sustain the conviction. *People* v. *Di Landri,* 250 App. Div. 52 (1st Dept., 1937).

> It cannot be held with any degree of certainty that the revolver which was found on the floor of the car belonged to the defendant or was in his constructive possession rather than in the possession of one of the other occupants of the car. The defendant's guilt, therefore, was not established beyond a reasonable doubt. Id at 52.

People ex rel. De Feo v. *Warden of City Prison,* 136 Misc. 836 (Sup. Ct., Kings Co., 1930) (and cases cited therein); *People* v. *Rivera,* N.Y.L.J. 9/18/74 p. 17 col. 6 (Spec. Narc. Ct., NY Co., 1974).

Excerpt from Respondents' Brief to the New York Court of Appeals.

In fact, the statutory presumption was enacted in 1936 to meet this difficulty. *People* v. *Rogan,* 94 N.Y.S. 2d 681, 683 (Sup. Ct., Kings Co., 1949).

> Or as the Appellate Division, First Department stated: Before enactment of Section 1898-a of the Penal Law (now superseded by Penal Law, Sections 1899, 1900),[18] mere presence in an automobile of a pistol and several persons was insufficient to establish constructive possession of the pistol by any of the persons. *People* v. *Anthony,* 21 A.D. 2d 666 (1st Dept., 1964).

In conclusion, it is apparent that the statutory presumption set out in Section 265.15 cannot apply to Lemmons, Allen or Hardrich. This is so both statutorily and constitutionally. Without this presumption there can be no legal conviction of Lemmons. Hardrich or Allen. Even if there had been evidence outside the presumption to sustain the conviction,[19] the conviction still cannot be sustained. The Court charged the jury on the presumption and Lemmons, Hardrich and Allen are entitled, at the very least, to a new trial.

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[18] Now superseded by Section 265.15 P.L.

[19] An example of this would be if Appellants' fingerprints had been found on these guns. The presumption would not apply but there would still be evidence of possession.

Decision of the County Court, Ulster County, Denying Respondents' Motion to Suppress Evidence (February 8, 1974).

STATE OF NEW YORK, COUNTY COURT,

COUNTY OF ULSTER.

THE PEOPLE OF THE STATE OF NEW YORK,

against

MELVIN LEMMONS, RAYMOND HARDRICK, SAMUEL ALLEN and MARCELLA MURPHY,

Defendants.

(Ulster County, Special Term, Final Papers submitted Jan. 2, 1974)

(Judge RAYMOND J. MINO, Presiding)

Appearances:

Aaron Klein, Esq., Attorney for Defendant, Melvin Lemmons.

Joseph Torraca, Esq., Attorney for Defendants, Raymond Hardrick and Samuel Allen.

Paul Goldberger, Esq., Attorney for Defendant, Marcella Murphy.

Hon. Francis J. Vogt, District Attorney for the People of the State of New York, (Ellen G. Donovan, of counsel).

RAYMOND J. MINO, Judge:

Decision of the County Court, Ulster County, Denying Respondents' Motion to Suppress Evidence (February 8, 1974).

This case come before this Court on a motion to suppress (CPL 710.20) evidence consisting of two pistols, a machine gun and a quantity of heroin to be used against the four named defendants on various illegal possession charges.

The facts as found by this Court at the suppression hearing are:

On March 28, 1973, at noontime, two state troopers stopped a motor vehicle on the Thruway for speeding. This vehicle contained the four defendants. The vehicle had New York State plates, but the driver, Lemmons, had a Michigan driver's license and no vehicle registration at all. The trooper radioed from his patrol car the name of the driver and a description of the car. The return message informed the troopers that Lemmons was wanted on a fugitive warrant for a weapons charge in Michigan. Lemmons was thereupon placed under arrest. One trooper then returned to the defendant's car and stood by the window on the passenger side. From this position he peered into a large open handbag situated between the window and the front seat. He was familiar with handguns and recognized the top of a pistol in the handbag. He placed the three remaining defendants under arrest for the possession of the pistol. A further search of the handbag revealed a second pistol. All four defendants were brought to the trooper barracks. About two hours later another trooper drove the defendant's car to the barracks. The defendants had no key to the trunk so troopers pried open the locked trunk without a warrant. The trunk contained the machine gun and heroin.

A consideration of the law as applied to the facts recited above, must begin with the issue, whether the arrest of Lemmons was valid. It is a clear rule of law that a police officer may arrest a person for a crime when he has reasonable cause to believe that such person has committed a crime, whether in his presence or not (CPL § 140.10, subd. 1 [b]). Reasonable cause to believe is, of course, similar

Decision of the County Court, Ulster County, Denying Respondents' Motion to Suppress Evidence (February 8, 1974).

to probable cause (*People* v. *Lombardi*, 18 A. D. 2d 177, 18 N.Y. 2d 1014). The law is also clear that the arresting officer himself does not need the personal knowledge of the facts constituting probable cause. He may rely upon communications with other officers if the police as a whole have information sufficient to provide probable cause (*People* v. *Smith*, 31 A. D. 2d 863). That the information ultimately came from a sister state cannot invalidate any such arrest (CPL § 570.34). The only perplexing factor in our case is that the Michigan arrest warrant was dismissed several days before the incident on the Thruway. The radio information, therefore, was to that extent inaccurate. Our Appellate Division has spoken clearly that an arrest made pursuant to a warrant, which was invalid at that point in time, is still a lawful arrest (*People* v. *LaBelle*, 37 A.D. 2d 135). So, in our case, it must be held that the arrest of Lemmons was valid.

The second issue is, whether the seizure of the two pistols in defendant Murphy's handbag was valid. There can be no question that a police officer may validly seize contraband in plain view provided he has a legal right to be in the position from which this view was made (*Ker* v. *California*, 274 U.S. 23). The testimony of Trooper Askew was that he peered through the passenger window into the open handbag and from his experience immediately recognized the top of a pistol. The pistol was in plain view. The trooper had every right to stand next to the vehicle. Therefore, the seizure was lawful.

The third issue is whether the search of the trunk and the seizure of the contraband therein was valid. The objection to the search and seizure was that it was done without a warrant, at a time and place removed from the point of arrest. The Supreme Court has held that an entire car, including the trunk may be searched, without a warrant when probable cause exists for the search apart from

Decision of the County Court, Ulster County, Denying Respondents' Motion to Suppress Evidence (February 8, 1974).

the arrest (*Chambers* v. *Maroney*, 399 U.S. 42). This concept is known as independent probable cause. Our Court of Appeals recognizes that under this concept the limitations of space and time governing searches incident to an arrest do not apply (*People* v. *Brown*, 28 N. Y. 2d 282, 286). The Appellate Division, Third Department, has applied this theory to sustain warrantless searches of automobiles away from the point of the arrest provided probable cause existed for that search (See *People* v. *LaBelle, supra; People* v. *Baer*, 37 A. D. 2d 150). The facts of our case indicate that defendants Murphy, Hardrick and Allen had all been arrested for possession of pistols in the car. Also, Lemmons had been discovered as being wanted on a fugitive warrant on a weapons violation. Whether this warrant was outdated is certainly crucial to the validity of any arrest pursuant thereto, but the legal effectiveness of the warrant is irrelevant to any use of the warrant as just another fact which may go to support probable cause for a search, independent of an arrest. With all the people implicated in a weapons violation in some manner, was it not reasonable to believe that other weapons were present in the car. These facts which confronted the police dictated their action in entering the trunk. Their actions must be governed by the standard applied to "a reasonable and prudent man, not a legal technician." (*Brinegar* v. *U.S.*, 338 U.S. 130). The standard as applied to this case, shows that the officers did have probable cause to open that trunk. The denial by the defendants that they had a key, justified prying open the trunk (*People* v. *Baer, supra*).

The motion to suppress is in all respects denied.

So ordered.

Dated: February 8, 1974

s/ Raymond J. Mino
County Judge of Ulster County

Order of the United States District Court Granting Writ of Habeas Corpus, Filed April 21, 1977.

UNITED STATES DISTRICT COURT
Southern District of New York

Samuel Allen, Raymond Hardrick and Melvin Lemmons,

Petitioners,

—against—

County Court, Ulster County, New York, Warden, Woodbourne Correctional Facility, Woodbourne, New York.

76 Civ. 4794

Order

Whereas, this Court, on April 19, 1977, order that the application for a writ of habeas corpus of petitioners Allen, Hardrick and Lemmons be granted, it is hereby

Ordered, that the application for a writ of habeas corpus by petitioners Allen, Hardrick and Lemmons is granted, that their judgments of conviction and sentences in *People of the State of New York* v. *Lemmons et al.*, 25-73 be set aside, that indictment No. 25-73 be dismissed, and that any form of custody to which petitioners are being subjected or are to be subjected pursuant to their convictions and sentences in this case be terminated forthwith.

Dated: New York, New York

/s/
United States District Judge
Southern District of New York

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 77-1554

COUNTY COURT, ULSTER COUNTY, NEW YORK; WOODBOURNE CORRECTIONAL FACILITY, WOODBOURNE, NEW YORK,

Petitioners,

-against-

SAMUEL ALLEN, RAYMOND HARDRICK and MELVIN LEMMONS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

NO. 77-1554

COUNTY COURT, ULSTER COUNTY, NEW YORK; WOODBOURNE CORRECTIONAL FACILITY, WOODBOURNE, NEW YORK,
Petitioners,

-against-

SAMUEL ALLEN, RAYMOND HARDRICK and MELVIN LEMMONS,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Respondents Samuel Allen, Raymond Hardrick and Melvin Lemmons submit this brief in opposition to petitioner's application for a writ of certiorari.

STATEMENT OF THE CASE

On March 28, 1973, Samuel Allen, Raymond Hardrick and Melvin Lemmons, the respondents herein, and one "Jane Doe", a sixteen year old girl, were riding in an automobile on the New York State Thruway. Respondents Lemmons was driving, with "Jane Doe" sitting in the right front seat; respondents Allen and Hadrdrick were in the back seat. When the car was stopped for a speeding violation,[1] one of the officers approached the right (passenger) side of the vehicle. Looking through the right front window, he could see Doe's handbag lying on the floor of the vehicle between Doe's right leg and the car door next to her. Protruding from the top of the bag was the handle of a gun. A search of the bag disclosed a second gun and various documents belonging to Doe. When questioned by the officers, Doe admitted that the handbag was hers.

A. THE TRIAL

Respondents Lemmons, Allen and Hardrick, together with Doe, were subsequently all charged, tried and convicted of possession of these two guns.[2] Except for the evidence that the guns were found inside Doe's purse in the car in which respondents and Doe were riding, the State introduced no evidence that any of the respondents had actual or constructive possession or even knowledge of the existence of the guns. Rather, the State relied on the statutory presumption of possession set forth in New York Penal Law §265.15(3):

> The presence in an automobile . . . of any firearm . . . is presumptive evidence of its possession by all persons occupying such automobile at the time such weapon . . . is found . . .

As the State concedes,[3] this statutory presumption provided the only possible basis for respondents' convictions.

At the close of the State's case, the respondents moved to dismiss the gun charges, claiming, *inter alia,* that the presumption could not properly be applied to them and that absent the presumption, there was no evidence on which the jury could return a guilty verdict. The trial court denied respondents' motion.

Respondents also argued, during the colloquy on the dismissal motion, that the "on-the-person" exception to the statutory presumption was applicable to this case. The trial court expressly rejected that argument at that time, and consequently, omitted any reference to the "on-the-person" exception when it thereafter charged the jury as to the presumption.[4]

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1. When the officers called in Lemmons' driver's license identification, they were advised that he was wanted on a fugitive warrant from Michigan, and he was arrested by the officers on that basis. It was later learned that the information concerning a fugitive warrant was inaccurate, and that there was no such warrant for Lemmons at the time of his arrest.

2. Respondents and Doe were also charged, tried and acquitted for possession of drugs and a gun allegedly found in the trunk of the car in which they were riding.

3. See *e.g.*, district court opinion at 2 (set forth in petitioner's appendix at 34a.

4. The Court's charge on the presumption was as follows: Our Penal Law also provides that the presence in an automobile of any machine gun or of any handgun or firearm which is loaded is presumptive evidence of their unlawful possession.

In other words, these presumptions or this latter presumption upon proof of the presence of the machine gun and the hand weapons, you may infer and draw a conclusion that such prohibited weapon was possessed by each of the defendants who occupied the automobile at the time when such instruments were found. The presumption or presumptions is effective only so long as there is no substantial evidence contradicting the conclusion flowing from the presumption, and the presumption is said to disappear when such contradictory evidence is adduced.

After conviction, respondents moved to set aside the verdict, again on the ground that since the statutory presumption could not properly apply to them, there was insufficient evidence to sustain the jury's verdict. The trial court also denied this motion.

B. THE STATE APPEALS

The state appellate courts affirmed respondents' convictions over strongly worded dissents. In respondents' brief to the New York Appellate Division, Third Department, the respondents raised a series of related arguments going to the impropriety of the statutory presumption and the insuffiency of evidence to sustain their convictions. Thus, they argued (1) that the presumption was unconstitutional;[5] (2) that the facts here brought respondents within the "on-the-person" exception to the statutory presumption; and (3) that the evidence presented at trial was "totally insufficient to sustain the conviction."

The appellate division affirmed by a vote of three to two. The majority wrote no opinion; the dissenting judges accepted respondents' argument (denominated (2) above) that as a matter of law, the "on-the-person" exception to the statutory presumption was controlling in this case, rendering the presumption inapplicable and the remaining evidence insufficient to sustain the convictions. *People v. Lemmons, et al.*, 49 A.D.2d 639 (3d Dept. 1975).

Respondents thereafter raised the same issues in the New York Court of Appeals. The majority in that Court,

5. The New York Court of Appeals had previously held that the presumption was constitutional on its face *(People v. DeLeon*, 32 N.Y.2d 944 (1973); *People v. Russo*, 303 N.Y. 673 (1951)). Consequently, respondents assumed for purposes of state appeal that these cases were controlling as to facial constitutionality. After stating that assumption and citing to *DeLeon*, respondents went on to argue that the presumption was unconstitutional as applied in this case.

while acknowledging that the constitutionality of the statutory presumption had been raised in the parties' briefs (*People v. Lemmons*, 40 N.Y.2d 505 (1976), petitioner's appendix at 37a, 39a-40a), did not expressly address that issue. However, the majority's adherence to its earlier decisions upholding the constitutionality of the presumption was implicit in its comment that the presumption was valid because of the difficulty of proving possession of guns found in automobiles, and the importance of facilitating prosecutions for possession of such weapons (*id.*, petitioners' appendix at 43a-45a).

The majority found that respondents' second claim — that the "on-the-person" exception to the statutory presumption was controlling here — was a factual issue for the jury which respondents had waived by failing to object to the judge's omission of that exception from his instructions to the jury.

The dissenting judges held that the "on-the-person" exception was controlling here. They also found that the statutory presumption was unconstitutional as applied in this case because the conclusion that respondents possessed the weapons in question did not rationally flow from the mere presence of those guns in Doe's purse (*id.*, petitioners' appendix at 51a).

C. THE FEDERAL COURT PROCEEDINGS

Respondents next filed an application pursuant to 28 U.S.C. §2254 in the District Court for the Southern District of New York. In the application, respondents argued, *inter alia*, (1) that the "on-the-person" exception to the statutory presumption rendered it inapplicable to the respondents, (2) that the presumption was unconstitutional on its face, (3) that it was unconstitutional as applied in this case, and (4) that respondents were convicted on less than proof beyond a reasonable doubt.

The District Court, in granting respondents' application, found the presumption unconstitutional as applied because the inference that respondents all possessed the guns did not naturally flow from the mere discovery of those guns in Doe's handbag. Consequently, the district court found that the trial court erred in failing to grant respondents' motion to dismiss the charges at the conclusion of the State's case.[6]

The Second Circuit Court of Appeals unanimously affirmed the granting of respondents' habeas corpus application. A majority of the panel did so on the ground that the statutory presumption was facially unconstitutional. The third judge concurred in the result, but on the ground that the statutory presumption was unconstitutional as applied in this case.

Petitioners' request for *en banc* reconsideration of the panel's decision was denied without dissent.

6. Because of its disposition, the district court found it unnecessary to determine another issue raised by respondents in the petition—that the trial court had committed constitutional error by failing to charge the jury as to the "on-the-person" exception to the statutory presumption. The district court did note, however, that in light of respondents' repeated arguments as to the inapplicability of the presumption on precisely this ground, their failure to object to this omission in the charge did not constitute a deliberate by-pass of state procedures as to that issue.

REASONS WHY THE APPLICATION FOR A WRIT SHOULD BE DENIED

POINT I

THE PETITIONERS' SUBSTANTIVE CLAIMS (POINT I OF PETITIONERS' BRIEF) FAIL TO STATE AN ACTUAL CONTROVERSY; THE SECOND CIRCUIT DID NOT ERR IN AFFIRMING THE GRANT OF RESPONDENTS' HABEAS CORPUS APPLICATION.

Point I of Petitioners' brief fails to state any "actual controversy" which would justify the granting of their certiorari petition. (United States Constitution, Article III; *cf. Steffel* v. *Thompson,* 415 U.S. 452, 458 (1974); *Roe* v. *Wade,* 410 U.S. 113, 125 (1973); *Environmental Protection Agency,* _____U.S._____ 97 S.Ct. 1635 (1977); *Stickel* v. *United States,* 76 S.Ct. 1067 (1956). At no point in this argument do the petitioners claim that respondents were properly convicted, or that the relief granted by the Second Circuit — affirmance of the district court's issuance of a writ of habeas corpus — was error.

Nor would such an argument be valid if it had been made. The conviction of the three respondents for jointly possessing two guns, based upon a showing only that respondents were traveling in the same car as a woman in whose purse the guns were found, was clearly unconstitutional. *Leary* v. *United States,* 195 U.S. 6 (1969); see also *Vachon* v. *New Hampshire*, 414 U.S. 478 (1974).

Thus, petitioners do not argue that the Second Circuit's affirmance in this case should be set aside. Rather, they only claim that the finding of facial unconstitutionality on which the Second Circuit majority based its decision was "broader than is required . . .", and should have been limited instead to a finding that the statutory

presumption in question was unconstitutional as applied in this case. (Petitioners' brief at 9.) In fact, petitioners cite with approval the concurring opinion in the court below which affirmed the grant of habeas corpus relief on the latter ground. (Petitioners' brief at 9.)

Respondents submit that the finding of facial unconstitutionality is proper and justified. (See Points IA-C, *infra*.) Even if the Court were to agree with every argument petitioners advance in Point I of their brief, however, respondents would still be entitled to the relief they have been granted, on the ground that the statutory presumption is unconstitutional as applied in this case. This is not a case in which enforcement of a state statute was enjoined by a federal court (compare *Steffel* v. Thompson, supra). Rather, it was the grant of an isolated habeas corpus application. Since the facial constitutionality issue which petitioners raise in Point I would not affect the relief granted to respondents, the parties lack the personal interest in the outcome which is requisite to an "actual controversy." Rather, the arguments advanced by petitioners are purely hypothetical as to this proceeding.

Indeed, it may be unnecessary for the Court ever to pass on the facial constitutionality issue raised by the petitioners. As the Second Circuit noted in its opinion in this case (petitioners' appendix at 25a), the state courts have failed to date to apply the *Leary* test[7] in judging the constitutionality of this statutory presumption. Rather, they relied on the earlier test of prosecutorial convenience articulated in *Morrison* v. *California,* 291 U.S. 82 (1934). That test is no longer good law, having been reduced to a "corollary" in *Tot* v. *United States*, 319 U.S. 463 (1943), and finally disgarded altogether in *Leary* in favor of the "more likely than not" test. *United States* v. *Leary, supra,* 395 U.S. at 34-36. Hopefully, the state courts, aided now

7. *Leary v. United States,* 395 U.S. 6 (1969).

by the Second Circuit's articulation of the proper test, will concur with that court's conclusion that the presumption in question is facially unconstitutional, thereby obviating the need for the Court to involve itself in this dispute.

Even if the state courts continue to maintain that the statute is facially constitutional, however, the State is, at the very least, obliged to refrain from seeking the Court's consideration of that issue until a lower federal court either enjoins application of the statute or grants habeas corpus relief to a defendant who the State can claim was properly convicted under this statute. Absent such prerequisites, there is no "actual controversy" in this case, and the petition for a writ of certiorari should be denied.

-A-

In Point IA of their brief, petitioners argue that a writ of certiorari should issue because of the conflict between the Second Circuit and the New York Court of Appeals over the facial constitutionality of this statutory presumption. Respondents submit that the fact that these two courts are presently in disagreement on this issue does not make it necessary for the Court to take up this case.

The question of the facial constitutionality of New York Penal Law §265.15(3) is too limited in scope to justify entering this case on the Court's already overcrowded calendar. Petitioners appear to concede that a decision by the Court on this issue would affect, at most, this single New York State statute and perhaps a few other closely related New York statutory presumptions. They cite to no other state's statutes, or conflicts between the Second Circuit's decision and other state or federal court decisions, which would be affected by the Court's involvement in this case.

Given the parochial nature of this issue, the New York State courts should resolve this conflict themselves.

As noted above, the state courts have heretofore failed to apply the proper test in judging the constitutionality of this presumption. They should be given an opportunity to do so now, with the benefit of the Second Circuit's findings on the issue, before the State insists that the Court intervene.

Moreover, the mere fact that the New York Court of Appeals disagrees with the Second Circuit's resolution of this issue provides no more justification for review by the Court than would a conflict between a court of appeals and a lower court over which the former had direct appellate review. With all due respect for the current debate over whether the Supremacy Clause of the United States Constitution vests the lower federal courts with *de jure* appellate jurisdiction over the state courts on questions of Constitutional law,[8] the inescapable fact is that the United States Constitution and Congress conferred such jurisdiction on the federal courts *de facto* by providing them with habeas corpus, injunctive and declaratory judgment powers over state proceedings. United States Constitution, Art. I, Sec. 9, cl. 2; 28 U.S.C. §§1253, 1331, 1343, 2201, 2202, 2281, 2241, 2254; 42 U.S.C. §1983. Thus, irregardless of whether the New York State courts are legally bound to follow the Second Circuit's finding that this presumption is facially unconstitutional, they would be acting at their peril if they failed to do so, since any defendant whose conviction was obtained through employment of this statute would be entitled to relief in the federal courts. By conferring this authority on the federal courts, the Constitutional framers and Congress clearly intended that the federal courts' decisions on con-

8. Compare *United States ex rel. Lawrence v. Woods*, 432 F.2d 1072 (7th Cir. 1970), *cert. denied*, 402 U.S. 983 (1971); *State v. Coleman*, 46 N.J. 16, 214 A.2d 393, (1965); *Iowa National Bank v. Stewart*, 214 Iowa 1229, 232 N.W. 445 (1930) with *Handy v. Goodyear Tire & Rubber Co.*, 230 Ala. 211, 160 So. 530 (1935); *Kuchenmeister v. Los Angeles & S.L.R.*, 52 Utah 116, 172 P. 725 (1918).

stitutional matters should be controlling over the state courts. The Second Circuit's exercise of that authority does not require that this Court grant certiorari in this case, particularly since the Second Circuit's decision on the issue is clearly correct (see Point IC, *infra*).

-B-

Petitioners' second argument (Point IB of petitioners' brief) is that the Second Circuit violated policies of judicial restraint by holding the statutory presumption in question to be facially unconstitutional when that Court could have limited itself to holding that the statute was unconstitutional as applied in this case. Although such restraint is appropriate where a litigant against whom a statute has been properly applied seeks to raise the constitutional rights of others by claiming that the statute is unconstitutionally overbroad (see *e.g.*, *Broadrick v. Oklahoma*, 413 U.S. 601 (1973)) or in certain other litigatory contexts, it is not applicable to the present case. Here, petitioners appear to concede, as they must, that the statutory presumption in question was unconstitutional as applied to the respondents. In such circumstances, the courts are empowered, and indeed obliged, to consider the facial constitutionality of the challenged statute. See *e.g.*, *Turner* v. *United States*, 396 U.S. 398 (1970); *Leary* v. *United States, supra; Tot v. United States*, 319 U.S. 463 (1943); *United States v. Romano*, 392 U.S. 136 (1965); *United States v. Gainey*, 380 U.S. 63 (1965).

The policy which the petitioners advance in this portion of their brief would preclude any court from ever deciding the facial constitutionality of any statute. For this reason, the arguments as to judicial economy, so prevalent in other portions of petitioners' brief, are notably absent here. Confining courts to an "as applied" analysis of even the most blatantly unconstitutional statutes would ob-

viously result in a substantial and totally unnecessary proliferation of litigation. To date, the courts have repeatedly demonstrated their ability to distinguish between those statutes which are unconstitutional on their face, and those in which the holding should be limited to a finding of unconstitutionality as applied. See *e.g., United States v. Gonzalez,* 442 F.2d 698 (2d Cir.) (*en banc*), *cert. denied, sub nom. Ovalle v. United States,* 404 U.S. 845 (1971). Divesting them of that discretion would serve only to substantially increase the caseload of an already overburdened judicial system.'

C

Petitioners' claim that the statutory presumption in question is constitutional on its face (Petitioners' brief at IC) centers primarily on an argument that the Second Circuit improperly substituted its judgment for the "judgment of the legislature in determining the rationality of the relationship between the proved fact and the presumed fact . . ." (Petitioners' brief at 11). Although petitioners provide a lengthy analysis of the legislative history of this statutory presumption, they fail to cite a single instance where the New York legislature even suggested that the conclusion that an individual possessed a weapon rationally flowed from the mere fact that he or she was riding in an

9. The fact that the Court has dismissed direct appeals challenging the constitutionality of other New York statutory presumptions (Petitioners' brief at 10-11) is of no consequence to this proceeding. None of those appeals involved the statutory presumption in question here. Moreover, a dismissal "for want of a substantial federal question" does not constitute a finding that the challenged statute was constitutional. Rather, such a ruling may be based on any one of a variety of considerations, such as the appellant's failure properly to preserve the issue (see *e.g., Cardinale v. Louisiana,* 394 U.S. 437, 439 (1969). As such, it is a finding only that the appellant in that particular case was not entitled to relief.

automobile in which that weapon was found. To the contrary, as the Second Circuit found after researching this issue, the history of this legislation establishes that this presumption was encoded solely because of the difficulty of securing convictions without it. (See the Second Circuit opinion, petitioners' appendix at 23a). Ironically, prosecutors were unable to convince either the juries or the courts that possession could rationally be inferred from mere presence. See *e.g., People v. Lemmons,* 40 N.Y.2d at 509-11, set forth in petitioners' appendix at 43a; *People ex rel. DeFeo v. Warden,* 136 Misc. 836, 241 N.Y.S. 63. Thus, the legislature's principal motivation for enacting this provision is in fact indicative of its unconstitutionality.

After recognizing this fact, the Second Circuit properly proceeded, as the Court did in cases such as *Leary v. United States, supra,* 395 U.S. at 37-54, to make its own determination as to the presumption's empirical validity (Second Circuit opinion, petitioners' appendix at 20a-30a). That analysis led the court to the conclusion that the question of whether a defendant possessed a weapon turned not merely on proof of presence but rather "on a variety of circumstances and on the largely unpredictable combinations in which they occur." (*Id.,* petitioners' appendix at 27a). Consequently, the court correctly concluded that this presumption, which treated presence alone as dispositive, was unconstitutional.[10]

In defense of the presumption, petitioners describe what they apparently believe to be the factual setting in which an inference of possession would most rationally flow from proof of mere presence—"when loaded large

10. Applying this same reasoning, a federal district court for the Southern District of New York has subsequently invalidated New York Penal Law §220.25(1), which made presence of a controlled substance in an automobile presumptive evidence of knowing possession by all of the car's occupants. *Lopez v. Curry,* 78 Civ. 653.

calibre firearms are on open display in an automobile occupied by more than one person." (Petitioners' brief at 13). Of course, the presumption is not drawn so as to apply only in such circumstances. Moreover, even in the factual setting which petitioners describe, a wide variety of factors other than mere presence, including, *inter alia,* the number of passengers in the car, their relationship to one another, their reasons for being in the car, the size and construction of the vehicle, the location of the weapons, the location of the passengers, the fingerprints on the weapons, the other items in the car, the conduct of the occupants, etc., would all be relevant to the question of whether possession was inferable as to one or more of the passengers. The impossibility of incorporating such unlimited variables into a statutory presumption (Second Circuit opinion, petitioners' appendix at 27a-30a), and the impropriety of imposing on a defendant the burden of disproving an inference of possession based on a statutory presumption which fails to incorporate such variables *(cf. Mullaney v. Wilbur,* 421 U.S. 684, 701 (1975)), are precisely why the statute in question is facially unconstitutional.

POINT II

RESPONDENTS DID NOT WAIVE THEIR RIGHT TO HABEAS CORPUS RELIEF EITHER BY FAILING TO OBJECT TO THE JURY CHARGE OR BY FAILING TO APPEAL DIRECTLY TO THE COURT FROM THE NEW YORK COURT OF APPEALS.

A

Respondents argued the unconstitutionality of the challenged presumption—as well as the related issue that the proof at trial was unconstitutionally deficient absent the presumption—in their motion for a directed verdict at the end of the government's case, their motion to set aside the verdict, their brief to the Appellate Division, and their brief to the New York Court of Appeals. The Second Circuit so found (Second Circuit opinion, petitioners' appendix at 10a, fn. 9),[11] and petitioners do not contest the accuracy of that finding in their brief to the Court.

Petitioners claim, however, that respondents

11. The Second Circuit found that the respondents argued that the presumption was unconstitutional "as applied" on each of these occasions. The court assumed that facial constitutionality was not separately raised, but found respondents' repeated arguments that the presumption was unconstitutional as applied to be sufficient to preserve the facial constitutionality issue (Second Circuit opinion, petitioners' appendix at 9a-15a). Respondents additionally submit that the issue of facial constitutionality was proper for federal review since the state's highest court had previously ruled on it (see *People v. DeLeon,* 32 N.Y.2d 944 (1973); *People v. Russo,* 303 N.Y. 673 (1951)), a fact which respondents expressly noted at each stage of the state trial and appellate proceedings. Where the highest court in a state has specifically held that a statute is facially constitutional, a subsequent litigant is not obliged to fruitlessly reargue its unconstitutionality merely to preserve the issue for federal review. See *e.g., Stubbs v. Smith,* 433 F.2d 64, 69 (2d Cir. 1976); *United States ex rel. Schaedel v. Follette,* 447 F.2d 1297, 1299-1301 (2d Cir. 1971); *cf. Picard v. Connor,* 404 U.S. 270, 275 (1971); *Wilwording v. Swenson,* 404 U.S. 249, 250 (1971); *Brown v. Allen,* 344 U.S. 443, 448-49 n. 3 (1953).

nonetheless waived their right to challenge the constitutionality of this presumption in the federal courts by failing to object to the omission of any reference to the "on-the-person" exception to the presumption in the judge's charge to the jury. This argument is frivolous for several reasons. First, respondents argued that the "on-the-person" exception to the statutory presumption was applicable to this case in their motion for a directed verdict at the close of the state's case. The trial judge expressly rejected this claim at that time, and consequently omitted any reference to that exception in his subsequent charge to the jury. For respondents to have reargued this issue again after the charge would have been purely redundant. The trial court "had been fairly presented" with that issue and had ruled on it. *Picard v. Connor, supra,* 404 U.S. at 275.

Moreover, the applicability of the "on-the-person" exception to this case is distinctly separate from the issue of the presumption's constitutionality. It was separately briefed and argued, both at trial and on appeal. Obviously, if the statutory presumption was unconstitutional, either facially or as applied in this case, then the jury could not constitutionally convict on the basis of the presumption. Consequently, the trial judge was obliged to dismiss the case at the conclusion of the state's presentation since no other proof of possession was offered. By allowing the case to go to the jury over respondents' objection, however, the trial judge incorrectly ruled that the presumption was facially constitutional and that it could constitutionally support a guilty verdict in this case. Respondents' failure to thereafter object to the judge's omission of the "on-the-person" exception in his charge to the jury was not a waiver of this issue, since even a properly instructed jury could not have rendered a constitutionally valid conviction.

Contrary to petitioners' assertions (petitioners' brief at 15-16), the New York Court of Appeals did not hold

that respondents had waived their right to challenge the constitutionality of the statutory presumption. Rather, that court implicitly reaffirmed its earlier decisions holding the provision constitutional by noting that this presumption was valid because of the difficulty of proving possession of guns found in automobiles and the importance of facilitating prosecutions for possession of such weapons (New York State Court of Appeals opinion, petitioners' appendix at 43a-45a). It was only as to respondents' separate claim—that as a matter of state law, the "on-the-person" exception to the statutory presumption was controlling here—that the court found waiver in respondents' failure to object to the incomplete charge.

This interpretation of the New York Court of Appeals decision, confirmed by the plain language of that decision[12] and the federal courts' interpretation of it, is also consistent with prior New York State decisional law on waiver. Since the question of the presumption's constitutionality was an issue of constitutional dimension, under New York law a contemporaneous objection was not necessary to preserve it for appellate review. *People v. McLucas,* 15 N.Y.2d 167, 256 N.Y.S.2d 799, 204 N.E.2d 846 (1965); *People v. DeRenzzio,* 19 N.Y.2d 45, 277 N.Y.S.2d 668, 224 N.E.2d 97 (1966); *People v. Arthur,* 22 N.Y.2d 325, 292 N.Y.S.2d 663, 239 N.E.2d 537 (1968); see also *United States ex rel. Schaedel v. Follette, supra,* 447 F.2d at 1300. The question of whether the "on-the-person" exception was applicable, however, could be viewed as predominantly an issue of state law, and therefore waived by the failure to object to the incomplete charge.

Consequently, petitioners are simply wrong in asser-

12. The New York Court of Appeals also stated that the issue which they regarded as waived was a "jury question." Since the constitutionality of a statutory presumption is not a jury question under any definition of that phrase, the Court was clearly not referring to that issue as the one which had been waived.

ting that the New York Court of Appeals held that the issue of this statute's constitutionality was waived in this case. Moreover, given respondents' repeated assertions of this claim both at trial and on appeal, there is no basis on which the Court could now find waiver.

B

Petitioners also argue that respondents waived their right to habeas corpus relief by failing to appeal the New York Court of Appeals decision directly to the Court under 28 U.S.C. §1257 (2) (Petitioners' brief at IIB). Petitioners cite no authority for this proposition, and seem to concede that it would constitute a new rule, substantially extending present exhaustion requirements. Obviously, the application of a totally novel procedural requirement would unjustly deprive respondents of the federal determination of their constitutional claims to which they are clearly entitled under the federal habeas corpus provisions. Moreover, the proposed rule is uniquely devoid of value or justification. The federalism interests underlying habeas corpus exhaustion requirements are fully vindicated when, as here, the state's highest court has passed on the issue. Similarly, the arguments of judicial economy upon which petitioners urge this rule are dubious; any savings to the lower courts would be at the expense of this Court's docket.

CONCLUSION

FOR THE ABOVE-STATED REASONS, THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Dated: New York, N.Y.
June 30, 1978

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1554

COUNTY COURT ULSTER COUNTY, NEW YORK; WOODBOURNE CORRECTIONAL FACILITY, WOODBOURNE, NEW YORK,

Petitioners,

against

SAMUEL ALLEN, RAYMOND HARDRICK and MELVIN LEMMONS,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS

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BRIEF FOR PETITIONERS

Decisions Below

The orders of the United States Court of Appeals denying petitioners' motion for reargument containing a suggestion for rehearing *en banc* were entered on February 1, 1978, and are reproduced in the appendix to the petition for certiorari (1a-2a). The decision of the Court of Appeals is reported at 568 F. 2d 998 (1977), and is reproduced in the appendix to the petition for certiorari (3a-32a). The decision of the District Court, which was affirmed by the

Court of Appeals, is unreported and is reproduced in the appendix to the petition for certiorari (32a-36a). The decision of the Court of Appeals of the State of New York, captioned *People* v. *Lemmons,* is reported at 40 N Y 2d 505, 354 N.E. 2d 836 (1976), and is reproduced in the appendix to the petition (37a-53a).

Jurisdiction

A petition for certiorari was filed on April 28, 1978, within ninety days of the entry of judgment of the Court of Appeals denying the petition for rehearing with a suggestion for rehearing *en banc* on February 1, 1978. Certiorari was granted by the Court on October 2, 1978. The Court's jurisdiction rests on 62 Stats. 928, 28 U.S.C. § 1254(1).

Questions Presented

1. Whether New York Penal Law § 265.15(3) may be collaterally attacked as unconstitutional on its face or as applied to the facts of respondents' case, when the New York Court of Appeals declined to consider these same claims because respondents' failure to object to an incomplete jury instruction failed to preserve them for appellate review?

2. Whether, if the Court below was correct in its conclusion that the facial constitutionality of the statute was implicitly affirmed by the New York Court of Appeals, thereby entitling respondents to an automatic appeal of that ruling to this Court pursuant to 28 U.S.C. § 1257(2), respondents' waiver of their right to take such an appeal bars federal habeas corpus review.

3. Whether the decision below, which struck down New York Penal Law § 265.15(3) as facially unconstitutional al-

though the statute had been upheld by the Court of Appeals of the State of New York, should be affirmed, in light of the well-established principle that a court should restrain from formulating a rule of constitutional law broader than required by the facts of the case, and in light of the standards laid down by this Court in prior decisions upholding the constitutionality of such presumptions.

Statute Involved

New York Penal Law § 265.15(3):

> "The presence in an automobile, other than a stolen one or a public omnibus, of any firearm, defaced firearm, firearm silencer, bomb, bombshell, gravity knife, switchblade knife, dagger, dirk, stiletto, billy, blackjack, metal knuckles, sandbag, sandclub or slungshot is presumptive evidence of its possession by all persons occupying such automobile at the time such weapon, instrument or appliance is found, except under the following circumstance:
>
> (a) . . . . if such weapon, instrument or appliance is found upon the person of one of the occupants therein;
>
> (b) if such weapon, instrument or appliance is found in an automobile which is being operated for hire by a duly licensed driver in the due, lawful and proper pursuit of his trade, then such presumption shall not apply to the driver; or
>
> (c) if the weapon so found is a pistol or revolver and one of the occupants, not present under duress, has in his possession a valid license to have and carry concealed the same."

Statement

A. The Arrest

Early in the morning of March 29, 1973, while en route from Detroit to New York City* in an automobile belonging to respondent Lemmons, the respondents and a sixteen year old girl** stopped at the home of respondent Lemmons' sister (Tr. 62) in Caledonia, New York for the purpose of exchanging vehicles with Lemmons' brother Robert (Tr. 19). After transferring some unidentified articles from the luggage compartment of their own car to that of the second car (Tr. 72-73), respondents and Jane Doe continued on their way to New York City, only to be stopped by the State Police at approximately 1:00 p.m. that afternoon for speeding on the New York State Thruway (Tr. 345).

Upon the request of New York State Police Officer Emsing, the driver, respondent Lemmons, produced a temporary New York registration certificate and Michigan driver's license (Tr. 165-166). A radio check indicated Lemmons to be a fugitive from Michigan on a weapons charge (A. 54***). A second police officer, one Trooper Askew, then returned to the vehicle, arrested Lemmons and placed him in a patrol car (Tr. 185-186).

At this point, Trooper Askew returned to the vehicle Lemmons had been driving. As Askew looked through the front window on the passenger side, he observed the butt of a handgun protruding from an open handbag resting on

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* While there is no direct evidence in the trial record that respondents began their journey in Detroit with New York City as an intended destination, respondents Hardrick and Allen made this representation to the jury at summation (Tr. 654). Page numbers preceded by "Tr." refer to the State Trial Transcript.

** This passenger was later adjudicated a youthful offender and will hereinafter be referred to as Jane Doe.

*** Page numbers preceded by "A" refer to the Joint Appendix herein.

the floor between the front seat and the door of the car (Tr. 187-188). Neither the handgun nor the bag had been visible the prior times the officers had approached the vehicle (Tr. 179-186). Askew opened the door and seized a .45 automatic pistol, beneath which he found a .38 caliber revolver (Tr. 191). The pistol was found to be fully loaded with conventional ammunition and the revolver with modified or "dum dum" bullets (Tr. 191, 337). The remaining three occupants were then arrested. The automobile was taken to the state police barracks where it was thoroughly searched. As the police were unable to locate the key to the trunk, they forced it open, discovering therein a loaded machine gun and more than a pound of heroin (Tr. 373-374).* Respondents were thereafter indicted for criminal possession of a dangerous drug in the first degree, unlawful possession of a loaded machine gun and unlawful possession of a loaded handgun (two counts).

B. The Trial

At the trial the prosecution relied upon statutory presumptions to establish respondents' joint constructive possession of the handguns, the machine gun and the heroin. Respondents and Jane Doe offered little evidence to rebut New York Penal Law § 265.15(3), which sets forth the statutory presumption applicable to the possession of a loaded firearm or other dangerous weapons, although they elicited some significant evidence** from prosecution wit-

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* The propriety of the search and seizure was sustained on appeal and never challenged on habeas corpus review. Indeed, respondents were foreclosed by this Court's decision in *Stone* v. *Powell*, 428 U.S. 465 (1976) from raising such a claim. Thus, it is the law of the case that the handguns were in plain view of the arresting officer. The decision denying the motion to suppress is set forth in full in the Appendix herein (A. 53).

** At summation, counsel for respondents placed great emphasis upon the fact that the car had been recently borrowed and

(footnote continued on following page)

nesses to rebut the presumption that they were in constructive possession of the machine gun and heroin.

At the close of the prosecution's case, all of the respondents and Jane Doe moved to have indictments dismissed for failure to prove a *prima facie* case (A. 12-17). These motions were denied by the court.

At the close of the case, the jury was instructed that it might rely upon the statutory presumptions* to find respondents guilty of possession of the firearms and the heroin (A. 22-23). However, the judge did not charge the jury that § 265.15(3)(a) provides that the presumption does not apply when a handgun is found on the person of one of the occupants of the car. Respondents did not object to the charge as given. Nor did they offer any proposed instruction relating to the "on the person" exception set forth in the statute, although they had just argued that very point the day before.**

The jury acquitted the respondents and Jane Doe of the first two counts of the indictment, but found them guilty of both counts of unlawful possession of a loaded handgun. At sentencing on June 28, 1974, respondents were sentenced to a maximum term of seven years on each of the two counts, to run concurrently. Jane Doe was adjudicated a youthful offender and given five years probation.

(footnote continued from preceding page)

the absence of the trunk key in a successful effort to rebut the evidentiary presumptions applicable to the contraband locked in the rear luggage compartment.

* The statutory presumption regarding the constructive possession of drugs found in New York Penal Law § 220.25 is not at issue herein.

** The court invited exceptions to the charge three times. There was also a lengthy colloquy covering other aspects of the charge. Nevertheless, the respondents did not even hint that the court was in error in failing to charge the "on the person" exception.

C. The State Court Appeals

Respondents' convictions were affirmed (3-2) by the Appellate Division, Third Department, 44 A D 2d 243 (1975). The majority affirmed without opinion. The dissenters agreed that the seizure of the guns was valid on a "plain view" theory but concluded that the presumption in § 265.15(3) was inapplicable to petitioners, as the handguns were concealed "upon the person" of Jane Doe, and thus the exception contained in § 265.15(3)(a) applied.*

The New York Court of Appeals affirmed the conviction. *People* v. *Lemmons,* 40 N Y 2d 505, 354 N.E. 2d 836 (1976) (Pet. 37a-53a). Although the court discussed respondents' claim that the presumption was inapplicable to the facts of their case, it explicitly stated in both the majority and concurring opinions that it was unable to decide this issue because of respondents' failure to object to the incomplete instruction.

D. Opinion of the United States District Court for the Southern District of New York

On April 19, 1977, the United States District Court for the Southern District of New York (Owen, J.) granted respondents habeas corpus relief. Although Judge Owen did not decide whether § 265.15(3) was unconstitutional on its face, he applied the test set forth in *Leary* v. *United States,* 395 U.S. 6 (1969) to the facts of the case and found that respondents' possession of the weapons could not reasonably be inferred from the presence of the handguns in Jane Doe's open purse. He then concluded that as a matter of state law, the trial judge was in error in denying the respondents' motions to dismiss at the conclusion of the State's case.

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* The inconsistency between these two findings is obvious. The guns could not logically be in plain view while simultaneously be concealed upon Jane Doe's person.

E. Opinion of the United States Court of Appeals for the Second Circuit

Before reaching the substance of respondents' constitutional claim, the majority of the panel of the court below considered and rejected the State's procedural arguments. The court disposed of the State's argument that respondents failed to exhaust their "facial unconstitutionality" claim, raised for the first time in the United States District Court, by deciding that the "as applied" claim respondents raised in state court was sufficiently related to their federal constitutional claim to satisfy the exhaustion requirement.

The court below also dismissed the State's argument that respondents had waived their right to challenge the constitutionality of the presumption upon federal habeas corpus review because their failure to object to the trial court's charge, insofar as it omitted a recitation of the "on the person" exception, and, indeed, their failure to urge in the state appellate courts either that the jury had been charged incorrectly or that their convictions had been obtained in violation of their federal constitutional rights, prevented those tribunals from reaching the merits of their federal constitutional claims.

After thus concluding the respondents' claim that the statute was facially unconstitutional was properly before it, the court below declared the statute unconstitutional on the ground it could not find any rational basis to support the presumption.

F. Motion for Reargument with a Suggestion for Rehearing *En Banc*

As the panel of the court below ruled that the issue of the presumption's facial unconstitutionality had been raised by respondents and implicitly rejected by the New York Court of Appeals, the petitioners urged, among other arguments presented in their motion for reconsideration, that respondents had thus waived their right to federal review by foregoing automatic appeal to this Court pursuant to 28 U.S.C. § 1257(2). Petitioners' motions for reargument with a suggestion for rehearing *en banc* were denied on February 1, 1978.

Summary of Argument

Respondents brought the instant habeas corpus proceeding to challenge the constitutionality of a state evidentiary presumption, both on its face and as it was applied to the facts of their case. Respondents' failure to object at the appropriate stage in the state court proceedings precluded the state appellate courts from considering their claim that the presumption was improperly applied to the facts of their case. Moreover, at no stage in the state proceedings did they attack the statute on federal constitutional grounds. Under this Court's procedural forfeiture doctrine, recently articulated in *Wainwright* v. *Sykes*, 433 U.S. 572 (1977), respondents are now barred from seeking habeas corpus relief.

Assuming *arguendo* that the court below was correct in concluding that the New York Court of Appeals implicitly considered and rejected respondents' federal constitutional claims, respondents had the right to take an automatic appeal to this Court under 28 U.S.C. § 1257(2). Rather than take such appeal, which would have resulted in a final federal disposition of their constitutional claims, respondents applied to the United States District Court for habeas corpus relief. Respondents' waiver of their right to appeal to this Court therefore precludes them, again under the *Sykes* rule, from seeking collateral relief in the lower federal courts.

If the court below was correct in reaching the merits of respondents' federal constitutional claims, it should not have considered the facial constitutionality of the statute, but should have restricted itself to an "as applied" adjudication. Moreover, having improperly reached the issue

of the statute's facial constitutionality, the court below erroneously concluded that the presumption did not comport with due process. In reaching this conclusion, the court below improperly substituted its own common sense and experience for that of the New York State Legislature, misapplied prior decisions of this Court relating to statutory presumptions, and disregarded the New York courts' own principled application of the presumption.

ARGUMENT

POINT I

The New York Court of Appeals explicitly held that respondents' failure to timely object to the incomplete jury charge precluded consideration of their claim that the presumption contained in Penal Law § 265.15(3) was inapplicable to the facts of their case. Therefore, having failed to object to the allegedly unconstitutional charge at the appropriate stage in the state proceedings or indeed to attack the statute itself on any ground at any point in these proceedings, respondents are now barred from collaterally attacking their convictions on federal habeas corpus review.

A. The Doctrine of *Wainwright* v. *Sykes* Applies to the Facts of this Case

In several recent cases, *Estelle* v. *Williams,* 425 U.S. 501 (1975); *Francis* v. *Henderson,* 425 U.S. 536 (1975) and *Wainwright* v. *Sykes,* 433 U.S. 72 (1977) (textual references hereinafter *"Sykes"*), this Court has sharply modified, if not reversed, the rule expressed in *Fay* v. *Noia,* 372 U.S. 391 (1963) which determined the effect of state procedural forfeiture on habeas corpus review. This Court had held in *Fay, supra,* that a failure to observe state timely objection rules was not a bar to habeas corpus review of underlying federal claims, absent a knowing waiver or deliberate bypass of state procedure. The principle now governing the effect of state procedural defaults

is that "absent a showing of cause for the non-compliance and some showing of actual prejudice resulting from the alleged violation", *Sykes, supra,* 433 U.S. at 84, a prisoner who has failed to make timely objection to a constitutional deprivation in state court is barred from attacking his conviction on that ground on habeas corpus review.

A review of the state court proceedings in the instant case with this principle in mind must lead this Court to conclude that respondents' failure to timely object to the incomplete jury charge, as well as their failure to argue or even allege, at any stage of the state court proceedings that their convictions were obtained in violation of their rights under the United States Constitution, present an insuperable bar to consideration of these claims upon federal habeas corpus review.

B. Respondents' State Court Claims

The record clearly shows that the entire thrust of the claim respondents pressed in state court is that Penal Law § 265.15(3) should not have been applied to them because the guns were in Jane Doe's purse and thus upon her person within the meaning of one of the exceptions set forth in the statute.*

1. The Motion to Dismiss the Indictment

Respondents first articulated this claim at the close of the People's case, when they moved for a dismissal of the indictments against them on the ground that the People had not stated a *prima facie* case.** Specifically, respond-

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* The pertinent exception, Penal Law § 265.15(3)(a), provides that the presumption shall not apply to other occupants of an automobile "if such weapon, instrument or appliance is found upon the person of one of the occupants therein."

** Upon information and belief, no written motion or memorandum of law was submitted to the trial court at that time. The entire colloquy within which these arguments were made is contained in the joint appendix herein (A. 12-22).

ent Lemmons argued that the presumption should not be applied to him because he was already under arrest and in the patrol car when the weapons were discovered. He also argued that as the weapons were thereafter found in Jane Doe's purse, possession could not be imputed to him. Respondents Allen and Hardrick argued simply that the "on the person" exception precluded the presumption's use against them. None of the respondents premised their motions on either state or federal constitutional grounds.

The trial court, expressing doubt as to whether the "on the person" exception could be triggered by presence of the firearms in a passenger's purse, denied the motions and the respondents went forward with their case.

2. The Incomplete Charge

At the close of the case, the judge charged the jury on the presumption, but did not advise it of the exception contained in subsection (a) (A. 22-32). Respondents failed to object,* although New York Criminal Procedure Law § 470.05 provides that such an objection must be made in order to preserve the issue for appellate review. The New York courts have consistently applied this section to jury instruction. *People* v. *Schwartzman,* 24 N Y 2d 241, 247 N.E. 2d 642, *cert. denied,* 396 U.S. 846 (1969); *People* v. *Simons,* 22 N Y 2d 533, 240 N.E. 2d 22 (1968), *cert. denied,* 393 U.S. 1107 (1969); *People* v. *Adams,* 21 N Y 2d 397, 235 N.E. 2d 214 (1968).

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* The respondents vigorously pressed their "on the person" argument the day before the charge was given and again soon after the verdict was returned. Even *Fay* v. *Noia, supra,* required some showing that a habeas petitioner did not deliberately bypass state procedural requirements. It is submitted that counsel had this objection uppermost in their minds at the time the instructions were given and deliberately failed to make it. While one can only speculate as to respondents' strategy, it may have been that counsel, believing albeit erroneously, that their earlier motion had preserved the issues for appellate review, hoped that if a conviction were to result, it would be so infirm as to be clear grounds for reversal. The New York Court of Appeals did not, of course, agree.

3. The Motion to Set Aside the Verdict

After the jury returned with guilty verdicts on the two handguns counts, the respondents moved to set aside the verdicts on the same grounds upon which they moved to dismiss the indictment, i.e. that as a matter of state law, they were entitled to the benefit of the "on the person" exception. They presented this same argument to the Appellate Division, which affirmed without opinion, and finally to the Court of Appeals.

4. The New York Court of Appeals' Opinions

The New York Court of Appeals was unable to reach the merits of respondents' "as applied" claim, because it found that their omission to make a timely exception to the incomplete jury charge failed to preserve this issue for appellate review.

Judge Jasen writing for the majority, clearly stated the basis for that court's affirmance as follows:

> ". . . [T]he trial court never charged the jury with respect to the 'on the person exception.' Nevertheless the defense did not except to the absence of this language in the court's charge. As a result, what we view as a jury question was never presented to the jury and for the reasons stated *we cannot conclude in this case that as a matter of law the presumption was inapplicable.*" 40 N Y 2d at 512. (Emphasis supplied).

In a separate opinion, Judge Jones explicitly restated the narrow basis for the court's affirmance as follows:

> "But no reference was made in the charge to the statutory provision that the presumption would not apply 'if such weapon . . . is found upon the person of one of the occupants.' No exception was taken to this charge and no request was made that the charge be accurately completed. *Thus, the jury was never advised of the exception and the case was submitted to*

and resolved by it on the basis of a blanket presumption which had become the law of the case. Accordingly, in the procedural posture in which these verdicts were returned there can only be an affirmance." 40 N Y 2d at 513. (Emphasis supplied).

C. Respondents' Federal Claims

1. The Opinion of the District Court

Thereafter, respondents commenced the instant habeas corpus proceeding. In paragraph four of their petition to the District Court (A. 5-9), respondents raised the "facially unconstitutional" argument for the first time. In paragraph five they alleged further that the incomplete jury charge deprived them of due process "in that it failed to charge a necessary element of the crime; namely, that the conviction could only be had if the jury found that the guns in question were not upon Jane Doe's person." (A. 9)

The District Court, relying upon *Fay* v. *Noia,* 372 U.S. 391 (1963) and the Second Circuit's decision in *Kibbe* v. *Henderson,* 534 F. 2d 493 (2d Cir. 1976), *rev. sub nom. Henderson* v. *Kibbe,* 431 U.S. 145 (1977), noted that there was not a deliberate bypass of state procedure. However, the court reasoned that it was not necessary to reach the "charge issue" as the presumption was, as a matter of law, inapplicable to the facts of the case, and consequently the trial judge's denial of the respondents' motion to dismiss the indictment was incorrect.•

• The District Court, in placing complete reliance upon *People* v. *Pugash,* 15 N Y 2d 65, 204 N.E. 2d 176 (1964), *cert. denied,* 380 U.S. 936, *app. dism.* 382 U.S. 20 (1965) did so in direct conflict with the New York Court of Appeals' own understanding of its holding in *Pugash* and its relevance to the case at bar. While the District Court held that *Pugash* mandated dismissal by the trial court, the New York Court of Appeals concluded that *Pugash* was not controlling, and that the applicability of the "on the person" exception was a question properly left to the jury. As the District Court was bound by the state court's interpretation of its own statute, *Garner* v. *Louisiana,* 368 U.S. 157, 166 (1971), its decision should have been reversed on that ground alone.

2. The Decision of the Court of Appeals

The District Court opinion was issued on April 17, 1977. On May 16, 1977, this Court reversed the Court of Appeals' decision in *Henderson* v. *Kibbe,* 431 U.S. 145 (1977) and on June 23, 1977, it decided *Wainwright* v. *Sykes, supra.* Notwithstanding the principles announced by this Court in these two significant decisions, and despite the explicit statements by the New York Court of Appeals, the court below dismissed the State's "procedural forfeiture" argument on the ground that respondents had consistently argued their federal constitutional claims at the state trial and appellate levels and thus there was no procedural forfeiture. As support for this conclusion, the court noted in the margin an excerpt of a point from one of respondents' state briefs. This excerpt is actually a condensation of respondents' argument in the state courts, and does not reflect the true nature of their claims. Examination of the entire point (A. 33, 39, 45), however, reveals that respondents' state court "as applied" claim was (1) predicated solely upon state law grounds• and (2) entirely

• Not only is respondents' "as applied" argument contained solely within a point heading which states "The Evidence was Insufficient to Support a Conviction of Lemmons, Hardrick and Allen," but, with the exception of a fleeting reference to the federal standard articulated in *Leary* v. *United States,* 395 U.S. 6 (1969), the argument placed complete reliance upon New York cases. It is thus apparent that respondents never articulated a federal constitutional claim in state court. One authority has stated in this regard that:

> ". . . [I]f the claim is made that a state statute is 'unconstitutional' or that it denies 'constitutional rights', it will be assumed that reference is being made to the state constitution and rights thereunder rather than the federal constitution. *New York ex rel. Bryant* v. *Zimmerman,* 278 U.S. 63, 67-68." R. STERN and E. GRESSMAN, SUPREME COURT PRACTICE 212 (5th ed. 1978).

Moreover, in *Gates* v. *Henderson,* 568 F. 2d 830 (2d Cir. 1977) (*en banc*), the court below denied habeas relief to a prisoner who

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derived from their argument that as the guns were on Jane Doe's person as a matter of state law, the presumption was inapplicable to them.

The court below not only recast and mischaracterized respondents' state court arguments in an effort to "cure" their obvious procedural forfeiture, it also evaded application of the *Sykes* doctrine by incorrectly concluding that respondents' failure to make a timely objection did not prevent their claim from being fully considered by the New York Court of Appeals.

However, five judges of the New York Court of Appeals explicitly stated that they were *unable* to reach the merits of respondents' "as applied" claim because of the incomplete charge.* Thus, this is clearly not a case in which a state court considered the merits of a prisoner's claim notwithstanding his waiver, e.g. *Lefkowitz* v. *Newsome,* 420 U.S. 283 (1975), but rather one in which the state appellate court was precluded from considering the merits because of the waiver, and so stated in its decision, e.g. *Francis* v. *Henderson, supra.*

Finally, this Court has attached even greater importance to a failure to object to an infirm jury instruction than to other state procedural waivers, recognizing that a correct charge might have resulted in a different verdict. Justice Rehnquist, who wrote for the majority of this Court in *Sykes,* recognized this precise point in his footnote in

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objected to the taking of his palm prints on fifth and sixth amendment grounds rather than fourth amendment grounds although the fourth amendment claim was raised in the New York Court of Appeals.

* As the court was unable to reach the "as applied" claim because the presumption was not fully charged, that court most certainly could not have reached the "facial" claim as this claim was never argued or briefed to any state court.

Mullany v. *Wilbur,* 421 U.S. 684, 704 (1975), in which he stated:

> "While *Fay* v. *Noia,* 372 U.S. 391 (1963), holds that a failure to appeal through the state-court system from a constitutionally infirm judgment of conviction does not bar subsequent relief in federal habeas corpus, failure to object to a proposed instruction should stand on a different footing. It is one thing to fail to utilize the appeal process to cure a defect which already infers on a judgment of conviction, *but it is quite another to forego making an objection or exception which might prevent the error from ever occurring.* Cf. *Davis* v. *United States,* 411 U.S. 233 . . ." (Emphasis supplied).

This principle was reaffirmed by Chief Justice Burger in his concurring opinion in *Henderson* v. *Kibbe, supra,* where he stated succinctly that:

> ". . . [T]he federal court was precluded from granting respondent's petition for collateral relief under 28 U.S.C. § 2254 because he failed to object to the jury instructions at the time they were given. This was precisely why the New York Court of Appeals refused to consider respondent's belated claim . . .
>
> "Thus, by failing to object to the jury charge, respondent injected into the trial process the very type of error which the objection requirement was designed to avoid. Federal courts may not overlook such failure on collateral attack." 431 U.S. at 157-158 (1977).

Thus, it is eminently clear that the court below was precluded from considering respondents' constitutional claim after the *Sykes* doctrine had been so firmly established by this Court.

POINT II

If the court below correctly concluded that the New York Court of Appeals by affirming respondents' convictions, implicitly upheld the constitutionality of the statute challenged herein, the respondents were entitled to automatic review of that decision by appeal to this Court under 28 U.S.C. § 1257(2). Respondents' failure to take that appeal constitutes a waiver sufficient to bar habeas corpus review.

A. If Respondents Had Taken Direct Appeals to the United States Supreme Court, They Necessarily Would Have Received a Final Determination of Their Federal Constitutional Claims

If the court below is correct in its analysis that despite respondents' failure to object to the incomplete jury charge, the New York Court of Appeals implicitly upheld the constitutionality of New York Penal Law § 265.15(3), respondents were therefore entitled to automatic review of that decision by appeal to this Court under 28 U.S.C. § 1257(2). Unlike the Supreme Court's certiorari jurisdiction which is discretionary, this Court would have "had no discretion to refuse adjudication of the case on its merits . . ." *Hicks* v. *Miranda,* 432 U.S. 322, 344 (1975). Any disposition of the appeal, including either summary affirmance or summary dismissal for "want of a substantial federal question", would have been an adjudication by this Court on the merits of the very claim presented in this habeas corpus proceeding.

B. If Respondents Had Taken Their Direct Appeals to this Court, They Would Now be Barred From Raising Their Present Claims in a Habeas Corpus Proceeding

If respondents had taken the appeal to which they were entitled, and had received the "actual adjudication" of the

constitutional claims they now present, to which they were also entitled, they would be barred from relitigating the same claims in a habeas corpus proceeding. Congress has so provided in 28 U.S.C. § 2244(c) which "embodies a recognition that if [the Supreme] Court has 'actually adjudicated' a claim on direct appeal or certiorari, a state prisoner has had the federal determination to which he is entitled." *Neil* v. *Biggers,* 409 U.S. 188, 191 (1972). This statute was "[c]onsistent with the overall scheme of allowing the petitioner to obtain one federal determination" of his federal constitutional claims. *United States ex rel. Radich* v. *Criminal Court of the City of New York,* 459 F. 2d 745, 749 (2d Cir. 1972), *cert. denied sub nom. Ross* v. *Radich,* 409 U.S. 1115 (1973). Thus, there can be no dispute that this case would not be before this Court today had respondents taken their appeals of right from the decision of the New York Court of Appeals in 1976.

C. Having Deliberately Waived Their Right To Take Such Appeals, Respondents Should be Barred From Seeking Habeas Corpus Relief

Last term, in *Wainwright* v. *Sykes, supra,* this Court enunciated a new test to determine when a state prisoner's failure to raise an issue of federal constitutional law at his state trial would bar him from pursuing that claim in a subsequent federal habeas corpus proceeding. See *Point I, ante.*

The test enunciated in *Sykes* should apply to respondents' failure to obtain a final federal determination of their present claim from this Court on direct appeal as well as their failure to comply with state procedural requirements. In fact, the rationale supporting this Court's holding in *Sykes* applies with equal or greater force to this situation even though (indeed, because) it is a federal determination which respondents waived. One of the major reasons for this Court's broad waiver test in *Sykes* was the interest in "finality in criminal litigation." *Wainwright* v. *Sykes,*

supra, 433 U.S. at 88. That interest bears with equivalent strength upon any procedure available to a prisoner in his state litigation, including most certainly his direct appeal to this Court. Had respondents taken that appeal from the 1976 decision by the New York Court of Appeals, their criminal litigation, begun in 1973, would have come to a complete and final conclusion long ago, rather than continuing into 1979.

The State's interest in "finality of criminal litigation" in this case, however, extends far beyond respondents themselves. The constitutional challenge presented herein directly threatens the conviction of every prisoner in New York to whom § 265.15(3) and similar statutes were applied. If this statute is invalidated, a serious possibility exists that such a decision would apply retroactively. See *Hankerson* v. *North Carolina,* 432 U.S. 233 (1977); *Ivan V.* v. *City of New York,* 407 U.S. 203 (1972). In that event, the delay in the determination of the constitutional issues raised herein—due *solely* to respondents' failure to take their appeals of right to this Court—would force New York to release many prisoneres convicted of firearms possession pursuant to the presumption and to retry many others. These consequences are not trivial, and consequences of this scope are not unique to this case. To the contrary, the invalidation of any criminal statute subject to automatic review under 28 U.S.C. § 1257(2) is likely to have widespread impact extending beyond a single case.

Thus it is apparent that the interest in "finality of criminal litigation" is merged with some of the same considerations of comity and federalism which supported *Wainwright* v. *Sykes, supra.* These considerations require federal courts to minimize their interference with state proceedings and state operations, *Rizzo* v. *Goode,* 423 U.S. 362, 380 (1976); *O'Shea* v. *Littleton,* 414 U.S. 488, 501-02 (1974); *Younger* v. *Harris,* 401 U.S. 37, 44 (1971), and support a rule in this case which would minimize federal interference by restricting belated habeas relief.

Another major justification for the expanded waiver holding—the interest in "making the state trial on the merits the 'main event' so to speak, rather than a 'tryout on the road' for what will later be the determinative federal habeas hearing"—was identified by this Court in *Sykes, supra,* 433 U.S. at 90. This interest, too, is at heart one of federalism and applies with great force to this situation, since respondents could have made their trial not merely the main event but indeed the "only appearance" by taking a direct appeal to the Supreme Court and obtaining a final federal determination of all their federal constitutional claims in the direct appeal process.

Another federal interest, that of avoiding forum-shopping by state prisoners between the Supreme Court and the lower federal courts, dictates a holding that a prisoner who foregoes direct appeal is barred from habeas corpus relief. One can easily imagine a state prisoner or his counsel carefully weighing the Supreme Court's most recent pronouncements in the areas analogous to the prisoner's federal claim, comparing those decisions to the holdings of the district and circuit where he is confined (or was convicted), and choosing the court most likely to look upon his claim with favor. Virtually no other litigant anywhere in the federal system except States and foreign dignitaries [See Article III, Sec. 2; 28 U.S.C. § 1251(b)] has that privilege. Certainly forum-shopping of this nature should not be encouraged since it promotes inconsistency and disharmony within the federal judiciary, and tends to defeat the perception of the federal courts as a unified national system.

Finally, there is a strong federal interest present in judicial economy. Direct appeal to the Supreme Court disposes of a federal claim in one federal court in one hearing. Habeas corpus review involves dispositions by the Federal District Court, the Court of Appeals and probably by the Supreme Court at least in considering whether a writ of certiorari should be granted. Plenary Supreme

Court review, if granted, requires a fourth round of papers and decisions. Surely this interest alone requires that a prisoner avail himself of one-step federal review or abandon his right to three or four-step review.

POINT III

The court below improperly considered the facial constitutionality of the statutory presumption. Moreover, having inappropriately reached this issue, it misapplied the standards applicable to such state evidentiary presumptions to incorrectly conclude that the statute was facially unconstitutional.

A. In striking the statute down as facially unconstitutional, the majority below departed from the well-established principle that a court should refrain from formulating a rule of law broader than required by the facts before it.

Judge Timbers' concurring opinion below contains a cogent statement of the restraints which preclude a court from formulating a rule of constitutional law broader than is required by the precise facts to which it is to be applied. *United States* v. *Raines*, 362 U.S. 17 (1960), citing *Liverpool, N.Y. & P.S.S. Co.* v. *Commissioner of Emigration*, 113 U.S. 33, 39 (1885). See *Broadrick* v. *Oklahoma*, 413 U.S. 601, 610-612 (1973); *Ashwander* v. *T.V.A.*, 297 U.S. 288, 347 (1936); *People ex rel. Alpha Portland Cement Co.* v. *Knapp*, 230 N.Y. 48, 60, 129 N.E. 2d 202 (1920) (CARDOZO, J.) As Judge Timbers correctly cautioned, such broad review is justified primarily in first amendment adjudications on the ground that a statute's very existence might serve to deter protected activity. *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205 (1975); *Bigelow* v. *Commonwealth of Virginia*, 421 U.S. 809 (1975); Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 852 (1970). However, this "chilling effect" rationale has no application to a law such as the one before us, which does not implicate first

amendment interests, and which furthermore regulates only trial procedure and not primary conduct. Indeed, for these reasons, facial review is rarely encountered in opinions involving the criminal process. 83 HARV. L. REV. at 852 n. 33.

An additional restraint, which Judge Timbers observed to derive "from [both] a desire to avoid intrusion into matters properly the province of the state courts [and] unnecessary constitutional showdowns", 568 F. 2d at 1011, should compel reversal of decisions such as the one below which not only set aside a criminal conviction affirmed by the highest state court but precludes retrial as well.

Only recently, in *Patterson* v. *New York*, 432 U.S. 197 (1977), this Court stressed the primacy of the states in the administration of criminal justice, and the respect to be accorded their statutes:

> "It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government, . . . and that we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States. Among other things, it is normally 'within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion. . . .'" 432 U.S. at 201 (citations omitted).

In harmony with the doctrine articulated in *Patterson, supra*, this Court has dismissed appeals from two decisions of the New York Court of Appeals upholding the constitutionality of criminal presumptions. *People* v. *Terra*, 303 N.Y. 332, 102 N.E. 2d 576, *app. dism. for want of a substantial federal question*, 342 U.S. 938 (1952)*; *People* v. *Kirk-*

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* The presumption upheld in *Terra*, now contained in New York Penal Law § 265.15(1), is virtually identical to the one at

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patrick, 32 N Y 2d 17, 295 N.E. 2d 753, *app. dism. for want of a substantial federal question*, 414 U.S. 948 (1973).

In *People* v. *Kirkpatrick, supra,* this Court was asked to review a New York Court of Appeals decision explicitly upholding the constitutionality of New York Penal Law § 235.10(1), which provides that a person who sells obscene material in the course of his business is presumed to do so with knowledge of both its contents and its obscene character.

Thus *Kirkpatrick* involved both a first amendment issue and a criminal statutory presumption. This Court's dismissal of that appeal, when viewed conjointly with its decision in *Patterson, supra,* provides additional support for Judge Timbers' position, and must be regarded as a clear signal to the lower federal courts that while they may be free to apply a facial analysis to statutes regulating first amendment activity, greater deference must be accorded to state evidentiary presumptions.

In rejoinder to the arguments raised by Judge Timbers, Judge Mansfield, writing for the majority below, listed several of this Court's cases on presumptions as purported examples of "on the face" review in this area, 568 F. 2d at 1010 n. 21, to support this mode of adjudication in situations in which first amendment values are not implicated. However, the judge's reasoning is misplaced. Not only does his view disregard the comity and federalism interests ever present in collateral attacks on state court convictions, considerations clearly not present in appeals to this Court from federal convictions, but in the leading deci-

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issue herein. Although the court below attempted to distinguish *Terra* from the instant case by claiming that New York law defines occupants of a room more narrowly than occupants of a car, neither the statutes themselves nor any judicial construction thereof make such a distinction.

sion of *Leary* v. *United States,* 395 U.S. 6, 29 (1969), this Court explicitly stated: "We consider whether *in the circumstances of this case,* the application of the presumption . . . denied petitioner due process of law." (Emphasis supplied)

But even apart from dubious reliance upon claimed precedent, Judge Mansfield's reasons for striking the presumption facially are untenable. In his view, the multiplicity of factual contexts in which the statutory presumption might occur militates against an *ad hoc* approach to its validity. In truth, however, the presumption's fact orientation and dependence on many possible variables, actually favor the "as applied" method, as a court can scarcely anticipate the multiplicity of circumstances that may determine the balance reached in individual circumstances. While Judge Mansfield's discussion of this point contains an implicit concession that there are indeed many sets of circumstances which would justify the application of the presumption, he nevertheless rejects the "as applied" approach as "fruitless", since "the validity of the presumption would be upheld only in instances where the evidence would, independent of the statute, support an inference of possession," 568 F. 2d at 1010. Assuming *arguendo* that this assertion is correct, it ill behooves the federal judiciary to strike down a state legislative enactment on the ground that it is superfluous.

Moreover, Judge Mansfield's rationale that the "as applied" method of analysis would result in a "wholesale conversion of state law issues into due process questions" by "every prisoner to whom this presumption had been applied" appears to be derived more from a concern that these petitioners will crowd the dockets of the lower federal courts than by a fear that the "as applied" approach will embroil the court in an evaluation of "the nature and quality of the evidence required to uphold a conviction under state law. . . ." 568 F. 2d at 1010.

In any event, this fear is misplaced. While it is axiomatic that a federal habeas corpus court may not sit as an appellate court to review the sufficiency of the evidence in support of a conviction unless the conviction is so devoid of evidentiary support as to be a violation of due process, *Garner* v. *Louisiana,* 368 U.S. 157, 163 (1961); *Terry* v. *Henderson,* 462 F. 2d 1125, 1131 (2d Cir. 1972), the necessity for meeting this very stringent standard of review will preclude almost all prisoners to whom the presumption has been applied from attacking their convictions on this ground.

B. Even if facial analysis is appropriate here, the challenged presumption satisfies the appropriate standard of constitutionality and should be upheld.

1. A state evidentiary presumption should be adjudged by the "more-likely-than-not" standard of constitutionality rather than the "reasonable doubt" standard.

The proper test for the constitutionality of a presumption has been most definitively set forth by this Court in *Leary* v. *United States, supra.* There, after reviewing its previous decisions as to the constitutionality of presumptions, this Court concluded:

> ". . . [A] criminal statutory presumption must be regarded as 'irrational' or 'arbitrary', and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is *more likely than not* to flow from the proved fact on which it is made to depend. And in the judicial assessment the congressional determination favoring the particular presumption must, of course, weigh heavily." *Id.* 395 U.S. at 36 (Emphasis supplied, footnote omitted).

Using that standard, the *Leary* Court invalidated the presumption set forth in 21 U.S.C. § 176a that possession

of marijuana "shall be deemed sufficient evidence" that the marijuana was illegally imported and that the defendant had knowledge of the fact of illegal importation. The Court relied upon a wide range of factual and statistical information in support of its conclusion and felt this information did not support the necessary determination that "at least a majority of marijuana possessors have learned of the foreign origin of their marijuana. . . ." 395 U.S. at 52.

In applying the "more likely than not" standard noted above, the *Leary* Court observed that it "need not reach the question whether a criminal presumption . . . must also satisfy the criminal 'reasonable doubt' standard if proof of the crime charged or an essential element thereof depends upon its use." 395 U.S. at 36, n. 64. In *Turner* v. *United States,* 396 U.S. 398 (1970), the Court again noted the question, *id.* at 416, but did not decide it because the statutes in question relating to heroin and cocaine possession would either meet both tests and thus survive, *ibid.*, or meet neither test and thus fail in any event, *id.* at 422-24.

In *Barnes* v. *United States,* 412 U.S. 837 (1973), the Court once again noted the unanswered question of the applicability of the "reasonable doubt" standard, *id.* at 842-43, but held that the common law presumption there at issue, that of "guilty knowledge . . . from the fact of unexplained possession of stolen goods", *id.* at 843, would meet the stricter test as well as the applicable "more-likely-than-not" test. *Id.* at 846. Significantly, however, the Court explained what the "reasonable doubt" standard would be if applicable. It applied the "rational connection" test of *Tot* v. *United States,* 319 U.S. 463 (1943), to the question of the presumption and stated that the presumption would be upheld if a rational juror could find beyond a reasonable doubt, based upon "common sense and experience", *Barnes, supra* at 845, that a rational connection existed between the proven fact and the presumed fact. Viewed in this light, at least one commentator has concluded

that the *Barnes* "reasonable doubt" test is less stringent than the *Leary* "more-likely-than-not" standard. See Rose, *The Automobile Presumption In The New York Narcotics Law*, 42 FORD. L. REV. 761, 766-67 (1973-74).

Whatever the form of the "reasonable doubt" test, it is clear that this Court has never applied it as the proper test for any presumption. On the other hand, in *United States* v. *Gainey*, 380 U.S. 63 (1965), this Court upheld a presumption which permitted the jury to infer guilt of the crime of carrying on a distilling business from presence at an illegal still, using only the "rational connection" test of *Tot* v. *United States, supra*. *United States* v. *Gainey, supra* at 66. Thus, *Gainey* did not present the "both or neither" situation which permitted the Court to avoid choosing a single test in *Leary, Turner* and *Barnes*, and in *Gainey*, this Court did choose a single test—the "more-likely-than-not" standard as set forth above in *Leary* v. *United States*.

Thus, in determining the constitutionality of Penal Law § 265.15(3), this Court should apply only the "more-likely-than-not" standard. Since it has never applied the "reasonable doubt" standard to federal law presumptions, it would be unfair, and contrary to controlling principles of comity and federalism for this Court to apply an arguably stricter standard to a state law presumption such as the one at issue herein. See *Patterson* v. *New York, supra*.

State law presumptions are and should be entitled to a more lenient standard of review from the federal courts than federal law presumptions, and this Court should accord more deference to a state presumption than it might to a federal enactment. Indeed, in *Patterson* v. *New York, supra*, this Court stressed the primacy of the states in the administration of criminal justice, and the respect to be accorded state criminal laws, particularly those regulating

> "procedures under which its laws are carried out, including the burden of producing evidence and the

> burden of persuasion. . . ." 432 U.S. at 201 (citations omitted).

This Court should not seek to apply a strict test of constitutionality which would unduly impair the State's freedom to structure its criminal justice system to meet the demands upon it, but if anything should strain to uphold an important and rational state evidentiary presumption such as the one in issue here. The "more-likely-than-not" test enunciated in *Leary* v. *United States, supra*, is the proper test of constitutionality in this case.

2. The history of Penal Law § 265.15(3) clearly shows that the statute has a sound basis in common sense and experience.

Cautioning that the judgment of the legislature in determining the rationality of the relationship between the proved fact and the presumed fact should be accorded great weight by the courts,* provided this judgment is based upon common sense or reliable empirical data, *United States* v. *Gainey, supra*, 380 U.S. at 63; *Leary* v. *United States, supra*, 395 U.S. at 39, this Court has upheld the constitutionality of statutory presumptions based upon "folklore", *United States* v. *Gainey, supra*, 380 U.S. at 67; "common sense", *Leary* v. *United States, supra*, 395 U.S. at 46; "common experience", *Barnes* v. *United States, supra*, 412 U.S. at 844 and even "the popular media",

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* While the decision of the court below acknowledge the "deference ordinarily due to legislative judgments regarding the connection between the proved fact and the presumed fact", 568 F. 2d at 1008, it nevertheless found that the "state's efforts to justify this statute to be without merit". *Id.* As the district court explicitly limited its decision to the facts of this case, deliberately declining to reach the question of the statute's facial constitutionality, the State was not forewarned that this was to be an issue on appeal. Thus, the State had neither cause nor opportunity to fully advise the court of the statute's legislative background.

Turner v. *United States, supra,* 396 U.S. at 417. In each of these cases, the Court did not intensively analyze the legislative history* of the statute to determine what connection, if any, Congress had found between the proved fact and the presumed fact. Instead, it imputed to Congress the capacity to amass the stuff of actual experience and cull conclusions from it. *Gainey, supra,* 380 U.S. at 67.**

Although the court below indicated a preference for reliable empirical data to support the rationality of the connection between the proved fact and the presumed fact, a state legislature is simply not required to conduct a factual study or statistical survey to justify every evidentiary presumption it enacts.*** The strictures of this approach in the present context are self-evident. As the report of one New York State legislative committee stated:

> "Statistics concerning the use of unlicensed handguns have an inherent limitation: the number of reported crimes involving handguns by no means indicates the number of such weapons actually involved. Clearly one unlicensed handgun can be responsible for a series of related or even unrelated crimes through its passage from criminal hand to criminal hand. Obviously the

* In *Turner* v. *United States, supra,* this Court did employ a wide range of statistical data derived from reports of various agencies. However, it did not indicate that this information had been considered by Congress at the time it enacted the statute.

** The only clear evidence of Congressional intent found by this Court in *Gainey* is that "Congress enacted these provisions because of 'the practical impossibility of proving . . . actual participation in the alleged activities except by inference drawn from [the defendant's] presence when the alleged acts were committed . . .'" *Gainey, supra,* 380 U.S. at 65. The court below, however found that prosecutorial convenience may not be used to justify enactment of a statutory presumption. 568 F. 2d at 1008.

*** In fact, "legislatures are presumed to have enacted constitutionally even if their source materials are otherwise silent . . ." *McDonald* v. *Board of Elections,* 394 U.S. 802, 809 (1969).

> only statistics available are for those instances where a handgun used in a crime has been seized." REPORT OF THE NEW YORK STATE JOINT LEGISLATIVE COMMITTEE ON CRIME, ITS CAUSES, CONTROL AND EFFECT ON SOCIETY, N.Y. LEG. DOC. No. 81, 38-39 (1968).*

Although little statistical data was or could have been available to the various legislative bodies who studied and enacted the instant presumption into law, the legislative history shows that these bodies relied upon their collective common sense and experience, as well as the experience and informed judgment of the many advisory groups they consulted to conclude that there is a strong likelihood that all passengers in a vehicle containing dangerous weapons such as loaded firearms, explosive devices and other criminal instruments enumerated in Penal Law § 265.15 share possession of that contraband.

a. The 1936 Statute

While the presumption at issue herein was not enacted until 1936, New York State has restricted the right of its citizens to carry dangerous weapons outside their homes and businesses since 1881.** It was not until 1926, however, that various law enforcement agencies and other individuals involved in the criminal justice system expressed their concern with the obvious interplay between dangerous weapons, automobiles and the commission of violent crimes.*** The

* This same report found that in 1965, two years after the statute at issue was amended by the Legislature, more than 6,000 illegal firearms were used in the commission of violent crimes such as murder, robbery and assault in New York State. The following year, almost 10,000 illegal weapons were used to commit such crimes. *Id.* at 43.

** Penal Code § 410, 1881 N.Y. Laws, Chap. 676.

*** Indeed, the special problems associated with the application of many existing law enforcement procedures to the automobile have been long recognized and still exist. See *Pennsylvania* v. *Mimms,* 434 U.S. 106 (1977); *Chambers* v. *Maroney,* 399 U.S. 42 (1970); *Carroll* v. *United States,* 267 U.S. 132 (1925).

Crime Commission of the State of New York, created by the New York Legislature in that year to "examine the crime situation in New York State and [to] report to the legislature its findings and recommendations and drafts of bills necessary to carry them out"• found that "the tools of the criminal today are the pistol and the automobile."•• Criticizing the then existing gun control laws as a "relic of the 'horse and buggy days', [which] has no place in these more strenuous automobile times,"••• the Commission proposed a new "Pistol Bill"•••• to combat a suddenly mobile criminal element. In its discussion of this problem, the Commission found that:

> "It is unquestionably true that the pistol is one of the greatest, if not the greatest, menaces to the peace of society today, and that its free use in the commission of crimes of violence has caused more arrests among people, and added more to the horror of crime than any other one thing. It is one reason why crimes of violence are common today and the criminal successful in such crimes, particularly holdups and robberies. Add to this the use of the automobile for quick getaway and you have a complete picture of the terror which is spread among people and of a situation which puzzles the police to detect or prevent and the courts to punish."•••••

The Commission, particularly concerned with the situation described above, and hoping to prevent armed occupants of an automobile from evading prosecution by "simply dropping their guns on the floors of the automobiles",• included in its proposed law a presumption similar to the one at issue herein. REPORT OF THE CRIME COMMISSION, N.Y. LEG. DOC. No. 23, § 1899s, p. 277 (1928).

• 1926 N.Y. Laws, Chap. 460.

•• REPORT OF THE CRIME COMMISSION, N.Y. LEG. DOC. No. 94, 19 (1927).

••• *Id.*

•••• *Id.* at 22.

••••• *Id.* at 18.

While the proposed statute failed of enactment in both 1927 and 1928 when the Commission urged it to the Legislature, it continued to receive vigorous support from those individuals most concerned with crime prevention and enforcement.•• Three successive New York City Police Commissioners, the Law Revision Commission of the State of New York, the New York State Attorney General, the Association of the Bar of the City of New York, the State Association of District Attorneys, the Committee on Criminal Courts, members of the judiciary and the press all urged its enactment.••• Finally, in response to Governor Lehman's anti-crime program, introduced by Special Message to the Legislature in January, 1936,•••• the presumption was enacted into law as Penal Law § 1898-a.•••••

In harmony with this measure and in further response to the Crime Commission Reports of 1927 and 1928, the Legislature enacted other provisions which further regu-

• *Id.* at 22.

•• REPORT OF THE CRIME COMMISSION, N.Y. LEG. DOC. No. 23, 271-278 (1928).

••• REPORT OF THE CRIME COMMISSION, N.Y. LEG. DOC. No. 94, 22 (1927); Public Papers of Governor Herbert H. Lehman—1936, 459 (1940); Bill Jackets for 1936 N.Y. Laws, Chaps. 216 and 390. See also: *People ex rel. DeFeo* v. *Warden*, 136 Misc. 836, 241 N.Y.S. 63 (1930); *People* v. *Russo*, 278 App. Div. 98, 103 N.Y.S. 2d 603, *aff'd.* 303 N.Y. 673, 102 N.E. 2d 834 (1951).

•••• In urging approval of the proposed statute, Governor Lehman stated that "[t]he foregoing proposals represent highly desirable and necessary extensions of the law relating to concealed weapons. They are designed to protect the law-abiding citizen and will not infringe in any way upon the privileges which he has hitherto exercised with respect to small firearms." Public Papers of Governor Herbert H. Lehman—1936, 104-105 (1940).

••••• 1936 N.Y. Laws, Chap. 390.

lated legal possession and transfer of firearms, thereby limiting their circulation within the State, and increased the severity of penalties for illegal possession.*

Legislative reports, Governors' memoranda and Court decisions of the era, which are noted above, all emphasized that the intimate relationship between illegal weapons and violent crime made it unlikely that the presumption would be used to convict individuals uninvolved in criminal activity.

b. The 1963 Amendment

The presumption contained in Penal Law § 1898-a continued as enacted in 1936 until 1963 when the penal statutes dealing with weapons and firearms were completely revised and reorganized. In 1960, the Joint Legislative Committee on Firearms and Ammunition was created by concurrent resolution of the New York State Assembly and Senate, "to undertake a comprehensive examination and study of all laws pertaining or in any way relating to or affecting the sale, possession and regulation of firearms and ammunition and the administration of such laws and to make appropriate recommendations relating thereto."**

During the life of this Committee, it conducted an intensive analysis of the laws of the fifty states, the New York statutes and the judicial constructions thereof.*** An advisory commission, composed of representatives of the New York State Bar Association, the County Judges Association, The Izaak Walton League, the New York State Police, the District Attorneys Association, the New York State Sheriff's Association, the New York State Rifle and Pistol

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* 1931 N.Y. Laws, Chap. 792, § 2; 1933 N.Y. Laws, Chap. 805; 1934 N.Y. Laws, Chap. 376; 1936 N.Y. Laws, Chaps. 53 and 54.

** REPORT OF THE NEW YORK STATE JOINT LEGISLATIVE COMMITTEE ON FIREARMS AND AMMUNITION, N.Y. LEG. DOC. No. 29, 9 (1962).

*** *Id.* at 10-17.

Association and the New York State Conservation Council, worked closely with the Committee in its efforts to revise New York's weapon and firearms statutes. Numerous public hearings were held throughout the State, and a fifty point questionnaire was distributed to each of the sixty-two district attorneys, nearly all criminal court judges in the state, police chiefs and numerous rod and gun clubs.* Both the public hearings and the questionnaire sought to elicit expert opinion on specific proposals to amend, standardize and conform to judicial construction New York's existing firearms statutes.

The Committee's work resulted in a draft study bill which was introduced in the Legislature on behalf of the Committee in 1962.** The draft bill amended § 1898-a to "make the presumption inapplicable to other occupants of [an] automobile if [the] weapon [is] actually found on the persons of one [of the] occupants.*** The Committee explained that this amendment was included in insure "conformity to judicially constructed requirements of reasonableness in [the] relation between [the] presumed fact and [the] proven one".****

After introduction of the study bill in the Legislature, one thousand copies of a modified draft of the original bill together with explanatory notes were distributed to district attorneys, police departments, bar associations and conservation groups. Public hearings were again held throughout the State, and were attended by representatives

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* *Id.* 27-33.

** N.Y.S. Senate Print. 2, intro. 2 (1962); N.Y.S. Assembly Print. 551, intro. 551 (1962).

*** REPORT OF THE NEW YORK STATE JOINT LEGISLATIVE COMMITTEE ON FIREARMS AND AMMUNITION, NEW YORK LEG. DOC. No. 29, 21 (1962). In Table 5 of this report, which was distributed along with the Study Bill, each of the many proposed changes in the statute was described and explained.

**** *Id.*

of those bodies. In addition, the chairman of the Committee appeared at more than a dozen meetings of interested organizations.*

Thereafter, in 1962, a final draft of the bill was introduced in the Senate and Assembly and enacted into law effective July 1, 1963. The presumption was amended to reflect the recommendation of the Commission that the "on the person" exception be included, and was renumbered as Penal Law § 1899.**

In 1961, one year after the creation of the Joint Commission on Firearms and Ammunition, the Legislature created the State Commission on Revision of the Penal Law and Criminal Code to comprehensively revise the New York Penal Law.*** This commission conducted a thorough and exhaustive study of all New York Penal statutes which resulted in the landmark New York Penal Law, effective September 1, 1967.**** In the new Penal Law the presumption was renumbered as § 265.15(3), but otherwise unchanged. See Gilbert, Criminal Code and Penal Law, Commission Staff Notes on the Proposed New York Penal Law at 1C-92 (1969).

The presumption has received extensive legislative commission and committee scrutiny for over forty years. Each study brought to bear the knowledge and experience of legislators, law enforcement officials, prosecutors and members of the judiciary throughout the State in dealing with the ever growing problem of illegal weapon possession. None of these officials, whose commitment to protect the innocent as well as to punish the guilty is unchallengable,

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* Report of the New York State Joint Legislative Committee on Firearms and Ammunition, New York State Leg. Doc. No. 35, 5 (1963).

** 1963 N.Y. Laws, Chap. 136.

*** 1961 N.Y. Laws, Chap. 346.

**** 1965 N.Y. Laws, Chap. 1030.

ever raised any concern that innocent persons would be wrongfully convicted through the use of this presumption. These careful studies offer irrefutable proof that the presumption, far from being either irrational or arbitrary, has an absolutely sound basis in both "common sense and experience", *Barnes* v. *United States, supra,* 412 U.S. at 845, and consequently satisfies any test of constitutionality it might be required to meet.

Significantly, the Model Penal Code contains a presumption closely resembling the one at issue herein, Model Penal Code § 5.06(3) (Prop. off. draft 1962), and virtually identical statutes are in effect in Illinois (Ill. Crim. Code § 24-1(c), eff. Oct. 1, 1977) and Nebraska (Neb. Rev. Stat. § 28-1011.19; 1967 Neb. Laws, Chap. 1969). A similar presumption has been enacted in New Jersey, which does not contain any exceptions (N.J. S.A. § 2A:151-7; 1966 N.J. Laws, Chap. 60). Thus the soundness of the New York Legislature's judgment is buttressed by the judgments of the legislatures of three other states and the prestigious American Law Institute.

3. In the circumstances of this case, possession of a weapon may rationally be inferred from respondents' presence in the automobile.

In *United States* v. *Romano,* 382 U.S. 136 (1975) this Court struck down a federal presumption deeming presence near an illegal still sufficient evidence to sustain a conviction for possession, custody or control of that still. 28 USC § 5601(a) (1)(b) (1970) (since amended). This Court found that while "presence tells us that the defendant was there and very likely played a part in the illicit scheme", 382 US at 141, mere presence, absent further evidence of the defendant's function at the still, is insufficient to establish possession.

While the court below placed great reliance upon *Romano,* that case is easily distinguished from the one at

bar. The *Romano* presumption implicitly equated "possession" with ownership of the still or control of its operation. Although New York Penal Law § 10.00(8) defines the term "possess" as meaning "to have physical possession or otherwise to exercise dominion or control over tangible property", this definition has been restated in cases involving firearms as requiring that the weapon merely be within the immediate control and reach of the accused and where it is available for his unlawful use if he so desires. E.g. *People* v. *Lemmons, supra,* 40 N.Y. 2d at 509-510; *People* v. *LoTurco,* 256 App. Div. 1098, 11 N.Y.S. 2d 644, *aff'd.,* 280 N.Y. 844, 21 N.E. 2d 888 (1939).

The *Romano* decision was clearly correct in concluding that an individual apprehended in the vicinity of an alleged still might not own either the distilling machinery or the real estate upon which it was erected, or control the distilling process itself. However, the instant presumption applies to a much more narrowly defined class of individuals, those individuals apprehended while within the intimate confines of an automobile. In this limited circumstance, an inference of possession of a firearm, as that phrase has been defined by the New York Courts, logically and rationally flows from presence in the vehicle. Indeed, from the facts of the instant case, it would be irrational to conclude otherwise.•

Moreover, in *People* v. *Levya,* 38 N Y 2d 160, 341 NE 2d 546 (1975), wherein the New York Court of Appeals upheld the constitutionality of Penal Law § 220.25(1),•• a presumption involving possession of a controlled substance

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• Certainly the firearms protruding from Jane Doe's handbag were within respondents' reach and available for their use. The actual "ownership" of the guns is irrelevant.

•• This statute provides that presence of narcotics in an automobile "is presumptive evidence of knowing possession thereof by each and every person in the automobile at the time such controlled substance was found."

otherwise identical to § 265.15(3), that court distinguished the presumption in *Romano* from presumptions flowing from presence in an automobile:

> "Indeed the unique and mobile nature of automobiles and their role in drug traffic also serves to distinguish the case before us from the circumstances found in *United States* v. *Romano* (382 U.S. 136). *Romano* is further distinguishable in that it involved a statute aimed at those who possess or control the manufacturing process rather than a possession of an illegal substance such as drugs (cf. *Leary* v. *United States,* 395 U.S. 6, *supra; Turner* v. *United States,* 396 U.S. 398, *supra*) and in that it involved imputed possession of large stationary equipment rather than of small, easily transferable packages. As the court's cases in this area make clear, each presumption's rationality must be judged within its own context." 38 N Y 2d at 166, n. 2.

The logic of this decision must have impressed the court below, for less than a year after its decision in the instant case, in *Lopez* v. *Curry,* —— F. 2d ——, Dkt. No. 78-2083 (2d Cir. September 15, 1978),• it expressly upheld the constitutionality of Penal Law § 220.25(1), the presumption at issue in *Leyva, supra.* The *Lopez* opinion disregarded *Romano, supra,* relying instead upon *United States* v. *Gainey,* 380 U.S. 63 (1965). In so doing, the court acknowledged that there are indeed circumstances under which an inference of possession may logically flow from simultaneous presence of an individual and contraband in the same automobile.

Although conceding that the presumption in *Lopez* and the instant case were virtually identical, the Second Circuit

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• This case was a habeas corpus proceeding brought by one of *Leyva's* co-defendants, Carmen Garcia.

attempted to reconcile its inconsistent holdings on two grounds, both of which must be rejected. In addition to noting an absence of explicit legislative justification for § 265.15(3),* the court below distinguished the two presumptions by finding that the presence of drugs in an automobile is much more suspicious than the presence of weapons. *Lopez* v. *Curry, supra,* at Slip. op. p. 7, fn. 8. However, since 1881 the New York State Legislature has regarded illegal weapons possession as serious felony offenses.** In so doing, the Legislature has implicitly deemed mere presence of such contraband to be highly suspicious. By concluding otherwise, the court below has arrogated unto itself a value judgment which should best be left to legislative discretion.

As the court below acknowledged in *Lopez,* this Court's decision in *Romano* does not establish a blanket rule that possession may never be inferred from presence. Indeed, the decisions of this Court clearly teach that the rationality of each statutory presumption must be judged within its own context. Considered within its factual context, Penal Law § 265.15(3) must be sustained.

4. The New York Courts have consistently applied the presumption in accord with the requirements of due process.

Although the court below concedes that the statute itself contains "exceptions to the presumption for three situations in which it would be especially anomalous to infer possession", 568 F. 2d at 1007, it expressed particular concern that the presumption could be used to convict a hypo-

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* New York Penal Law § 220.25(1), although clearly modeled upon § 265.15(3), was enacted thirty years later in 1965. The evidence of legislative intent supporting the latter enactment is more closely at hand, and thus easier to document. However, the same rationale supports both presumptions.

** New York Penal Code § 410, 1881 N.Y. Laws, Chap. 676; New York Penal Law §§ 265.01 *et seq.* (*McKinney's* Supp. 1977).

thetical hitchhiker arrested while a passenger in a vehicle containing a concealed Derringer or Barretta.* *Id.* Despite this concern, however, that court was unable to point to a single reported case in which the presumption was applied to a remotely similar set of facts. Indeed, counsel for petitioners has exhaustively searched every reported case applying the presumption since it was enacted in 1936 and has failed to uncover a single case in which a conviction based on such circumstances has been upheld. It is equally unlikely that such cases will occur in the future. The New York Courts are thoroughly familiar with and have conscientiously applied the "more likely than not" standard since it was first articulated by this Court in its decision in *Leary* v. *United States, supra,* e.g. *People* v. *Leyva, supra; People* v. *Kirkpatrick,* 32 N Y 2d 17, 295 N.E. 2d 753, *app. dism. for want of a substantial federal question,* 414 U.S. 948 (1973); *People* v. *McCaleb,* 25 N Y 2d 394, 255 N.E. 2d 136 (1969), just as they consistently applied the "rational connection" test approved by this Court prior to *Leary,* e.g. *People* v. *Russo,* 278 App. Div. 98 (1st Dept. 1951), affd. 303 N.Y. 673, 102 N.E. 2d 834 (1951); *People* v. *Terra,* 303 N.Y. 332, *app. dism.,* 342 U.S. 938 (1952).

Moreover, the New York courts have *always* applied the presumption on a case by case basis, e.g. *People* v. *Garcia,* 41 A D 2d 560, 340 N.Y.S. 2d 35 (2d Dept. 1973); *People* v. *Alston,* 94 Misc. 2d 89, 404 N.Y.S. 2d 277 (1978); *People* v. *Anderson,* 74 Misc. 2d 415, 344 N.Y.S. 2d 15 (1973) and have not hesitated to reverse convictions where an inference that the accused possessed the firearm did not follow rationally from his presence in the vehicle, e.g. *People* v. *Cohen,* 57 A D 2d 790, 394 N.Y.S. 2d 683 (1st Dept. 1977); *People* v. *Scott,* 53 A D 2d 703, 384 N.Y.S. 2d 878 (2d Dept. 1976); *People* v. *Trucchio,* 47 A D 2d 934, 367 N.Y.S. 2d

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* Of course, the instant case did not involve a small concealed weapon but rather two large caliber weapons exposed to plain view.

76 (2d Dept. 1975); *People* v. *Garcia,* 41 A D 2d 560, 340 N.Y.S. 2d 35 (2d Dept. 1973); *People* v. *Law,* 31 A D 2d 554, 294 N.Y.S. 2d 394 (3rd Dept. 1968).

Indeed, it is highly improbable that a New York Court would permit a verdict to stand based on the circumstances invented by the court below. It is interesting to note in this regard, that in 1962 when asked the following question by the Joint Commission on Firearms and Ammunition,

> "Should the presumption of possession arising from the presence of a weapon in an automobile (§ 1898-a) apply to an occupant who is neither the driver nor the owner and who is unaware of the weapon which is kept out of sight in a glove, trunk or other compartment?"

eighty-six percent of the Criminal Court judges responding answered in the negative.•

Finally, the court below not only assumes that a judge in New York would tolerate a conviction based upon the hypothetical situation it has postulated, but the court also assumes, entirely without basis, that a prosecutor would seek to obtain an indictment on those facts alone. To the contrary, both disciplinary rules and ethical considerations governing the conduct of public prosecutors clearly mandate against a district attorney seeking such an indictment.••

• REPORT OF THE JOINT COMMISSION ON FIREARMS AND AMMUNITION, N.Y. LEG. DOC. No. 29, 30-33 (1962). In 1962, the "rational connection" test of *Tot* v. *United States, supra,* was the applicable constitutional test. It can be safely assumed that in view of the more stringent "more-likely-than-not" test applicable today, the negative vote would be unanimous.

•• New York Judiciary Law, Code of Professional Responsibility, Disciplinary Rule DR7-103 (McKinney 1975) provides that:

> "A public prosecutor or other government lawyer shall not institute or cause to be instituted criminal charges when he

(footnote continued on following page)

5. The statute compares favorably with federal statutory presumptions upheld as constitutional by this Court.

The federal statutory presumptions found to be constitutional by this Court in *Gainey, Leary, Barnes* and *Turner,* impose a far heavier burden upon the accused to come forward with evidence in rebuttal than the presumption at issue herein. Those presumptions decree that the proved fact, standing alone, is deemed to be sufficient evidence to authorize conviction unless the defendant provides a satisfactory explanation to the jury.

The New York statute is, on its face, far more permissive than the federal presumptions upheld by this Court. While Penal Law § 265.15(3) permits a jury to be charged that the proved fact (presence) is evidence of the presumed fact (possession), the presumption does not require the jury to infer one from the other, nor does it require it to convict upon proof of presence alone, even if the defendant fails to produce any evidence in rebuttal. *People* v. *Leyva, supra.*

The permissive nature of the presumption is reflected in the instructions to the jury in the instant case:

> ". . . [U]pon proof of the presence of the machine gun and the hand weapons, you may infer and draw a conclusion that such prohibited weapon was possessed

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(footnote continued from preceding page)

> knows or it is obvious that the charges are not supported by probable cause."

Ethical Consideration 7-13 promulgated thereunder advises that:

> "The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict. This special duty exists because: (1) the prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of government powers, such as in the selection of cases to prosecute . . ."

by each of the defendants who occupied the automobile at the time when such instruments were found. (A25)

• • •

"The presumption or presumptions which I discussed . . . need not be rebutted by affirmative proof but may be rebutted by any evidence or lack of evidence in the case." (A32)

Indeed, the verdicts in this case, acquitting the respondents of possession of the contraband in the trunk and convicting them of possession of the contraband in the handbag* clearly demonstrates a jury's reluctance to convict on the presumption alone.

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* The handbag, which concededly had been brought on the journey by the sixteen year old co-defendant, was open and positioned on the floor of the car at the time Officer Askew peered inside, although neither the handbag nor the firearms had been visible to either officer a few minutes earlier. The handguns were fully loaded, heavy, large caliber weapons. Jane Doe clearly made no effort to conceal the weapons from her three male companions, who had easy access to them.

Moreover, Jane Doe's counsel strongly urged in summation (A. 18-21) that had the firearms been Jane Doe's exclusive property, she would have had both sufficient time and cause to close the bag prior to Askew's second approach. However, if the guns had been hastily tossed into the bag by respondents, she would have been too flustered and excited to remember to secure them from view. He also belabored what was no doubt obvious to the jury, to wit, that it was highly improbable that his client could either have used these "cannons" effectively or comfortably carried them in her purse.

In contrast, Mr. Torraca, counsel for respondents Allen and Hardrick, virtually conceded that the handguns belonged to his clients who, supposedly fearful of the violence in New York City, brought along these guns for protection:

"Sometimes people do other things. For example, if you were living under their times and conditions and you traveled from a big city, Detroit, to a bigger city, New York City, it is not unusual for people to carry guns, small arms to protect themselves, is it? There are places in New York City policemen fear to go." (A. 21).

CONCLUSION

The order and judgment of the courts below should be reversed, New York Penal Law § 265.15(3) should be declared constitutional, and respondents should be denied habeas corpus relief.

Dated: New Nork, New York
November 28, 1978

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1554

COUNTY COURT ULSTER COUNTY, NEW YORK; WOODBOURNE CORRECTIONAL FACILITY, WOODBOURNE, NEW YORK,

Petitioners,

against

SAMUEL ALLEN, RAYMOND HARDRICK and MELVIN LEMMONS,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS

Counterstatement of the Questions Presented

1. Whether a defendant is entitled to federal review of his claim that a State statute is unconstitutional, where the state's highest court has previously ruled that the statute was constitutional on its face and the defendant had argued in the trial court and at every stage of the State appellate proceedings that the statute was unconstitutional as applied in his case.
2. Whether a defendant who did not take a direct appeal to this court from the state highest court is entitled

to challenge the constitutionality of a state statute by federal habeas corpus proceedings.

3. Whether New York Penal Law § 265.15(3), which provides that in most circumstances all persons in a car are presumed by their mere presence jointly to possess any weapon found therein, is unconstitutional on its face and/or as applied in this case.

4. Whether a federal court may reach the question of whether a state statute is unconstitutional on its face, once the court has determined that the statute is unconstitutional as applied in the present proceeding and that it is incapable of being construed in such a manner so as to limit it to cases in which it could be applied constitutionally.

Summary of Argument

The United States Court of Appeals for the Second Circuit was correct in holding that respondents exhausted all state remedies and state procedural requirements as to their constitutional claim that New York Penal Law § 265.15(3) is unconstitutional before petitioning the federal courts. New York State's highest court has repeatedly held that this statute is constitutional. Respondents argued that the presumption was unconstitutional as applied in the trial court and at every stage of their direct appeal. The New York Court of Appeals did not find, and could not properly have found, that respondents waived this issue by failing to object to an omission in the judge's charge. Rather, the Court of Appeals only found waiver as to a state law claim which respondents had also argued on appeal (Point I).

Respondents' application for federal review of their constitutional claim under 28 U.S.C. § 2254 was proper. They were not required, as petitioners maintain, to seek

such review by direct appeal under 28 U.S.C. § 1257 (Point II).

The Second Circuit was also correct in holding that New York Penal Law § 265.15(3) is unconstitutional, both on its face and as applied in this case. All of the persons in an automobile may not rationally be presumed, by their mere presence, to jointly and simultaneously possess any weapon found therein. The legislative history of this provision establishes that it was enacted not because it was rational, but rather because prosecutors could not convince judges or juries that such an inference was rational. The presumption is intended improperly to shift the burden of proof to the defendant. In the present case, that presumption was employed by the State to produce the patently irrational conviction of the three respondents on charges that they jointly possessed two weapons found in a fourth passenger's purse (Point III).

The federal Court of Appeals was also correct in reaching the issue of whether the presumption was unconstitutional on its face, after first determining that it was unconstitutional as applied and that it could not be construed in such a way as to limit it to cases in which it could be applied constitutionally (Point IV).

Counterstatement of the Case

A. The Facts of the Case

On March 28, 1973, the three respondents and one "Jane Doe" (a sixteen year old juvenile), were stopped for speeding while riding in an automobile on the New York State Thruway (Tr. 345),[1] Respondent Lemmons was driving, Jane Doe was in the right front seat, and respondents Allen and Hardrick were in the back seat

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[1] References preceded by "Tr." are to the pages of the trial transcript.

(Tr. 187). When the officers radioed in Lemmons' driver's license identification number, they were advised that he was wanted on a fugitive warrant from Michigan, and he was accordingly arrested on that charge (Tr. 185). It was later determined that this information was incorrect and Lemmons was not wanted as a fugitive (55a),[2]

While the car was stopped, one of the troopers approached the right (passenger) side of the vehicle. Looking through the right front window, he could see Doe's handbag lying on the floor between the right side of the front seat and the right front door of the car. Protruding from the top of the bag was the handle of a gun. The trooper opened the door and seized the gun. A further search of the handbag revealed a second gun as well as various documents belonging to Doe (Tr. 187-91, 200). When questioned by the officers, Doe admitted that the handbag belonged to her (Tr. 200).

B. The Trial

The three respondents and Doe were subsequently all charged with possession of both of the guns. At trial, the State produced no proof that any of the respondents ever possessed either weapon. Rather, as the prosecutor conceded at the end of her case, the State proved only that Doe "was armed with at least two guns" (12a). To compensate for this lack of evidence, the State relied on New York Penal Law § 265.15(3), which provides that under most circumstances, all persons in a car are presumed by their mere presence jointly to possess any weapon found therein (12a-17a). The State concedes that

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[2] References followed by "a" are to the joint appendix.

Later, at the state police barracks, the officers also searched the trunk of the car, uncovering a machine gun and approximately one pound of heroin (Tr. 373-74). The car was shown to belong to Respondent Lemmons' brother (Tr. 19), however, and the three respondents and Doe were all acquitted of the charges that they had possessed those items.

the presumption provided "the only basis for the conviction" in this case (Pet. 34a;[3] see also joint appendix at 12a-17a; Petitioners' brief at 5).

At the close of the State's case, when it first became evident that the prosecutor was relying on the statutory presumption, respondents moved for a dismissal of the charges, arguing that the presumption could not validly be applied in this case and that absent the presumption, there was no evidence on which the jury could return a guilty verdict (12a-17a). In support of that claim, they also argued that the "on the person" exception to the presumption rendered it inapplicable in this case (12a-17a). The trial court denied that motion (17a) and thereafter charged the jury as to the presumption without charging the exception (22a-23a).

The jury subsequently convicted all three respondents, as well as Doe, of each possessing both of the guns.

Before judgment was imposed, respondents again attacked the statutory presumption in a written motion to set aside the verdict. The motion itself asserted that resort to the presumption set out in § 265.15 "was improper both statutorily and constitutionally."[4] The accompanying memorandum of law presented two arguments in support of this claim. First, it argued that since the guns were found in Doe's handbag, the "on the person" exception rendered the presumption inapplicable in this case as a matter of state law. Secondly, it argued on the basis of *Leary* v. *United States*, 395 U.S. 6 (1969) that the presumption was unconstitutional as applied:

> "Secondly, if the presumption is applicable here, then it is unconstitutional as applied.

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[3] References preceded by "Pet." are to the Appendix of the petition for a writ of certiorari.

[4] This motion and the relevant portions of the accompanying memorandum of law are set forth in the joint appendix at 33a-38a.

In *Leary* v. *United States,* 395 U.S. 6 (1969), the Supreme Court held that a presumption must be regarded as 'irrational' or 'arbitrary', and hence unconstitutional, unless it can be said with substantial assurance that the presumed fact is more likely than not to flow from the proven fact upon which it is made to depend. Id. at 36.

• • •

Assuming that the presumption is constitutional on its face (*People* v. *DeLeon,* 32 N.Y.2d 944 (1973)), it is clearly unconstitutional as applied.

• • •

Without resort to the presumption, the evidence is totally insufficient to sustain the conviction. *People* v. *DiLandri,* 250 App. Div. 52 (1st Dept., 1937).

• • •

In conclusion, it is apparent that the statutory presumption set out in § 265.15 cannot apply to those who were merely occupants of this car. This is so both statutorily and constitutionally. Without this presumption there can be no legal conviction of Lemmons, Hardrich or Allen.'"[5]

The trial court denied this motion (Tr. 776) and then sentenced all three respondents to maximum terms of seven years incarceration on each of the two counts, the sentences to run concurrently.

C. The State Appeals

In their briefs to both of the State's appellate courts, respondents once again argued that the presumption was

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[5] This argument is set forth in its entirety in the joint appendix at 36a-38a.

(1) inapplicable as a matter of state law and (2) unconstitutional as applied.[6]

The majority in the Appellate Division affirmed without opinion. The dissenters agreed with respondents' state law argument. 44 A.D. 2d 243 (1975).

The majority in the New York Court of Appeals rejected both of respondents' challenges to the presumption. 40 N.Y.2d 505, 354 N.E.2d 836 (1976) (Pet. 37a-53a). Having previously held the presumption to be constitutional on numerous occasions, the Court's majority contented itself on this issue with merely noting that there was an "urgent need" for the presumption, given the difficulties prosecutors had in proving weapons possession without it (Pet. 44a-45a).

Since the dissent in the appellate division had accepted respondents' state law argument, the majority in the Court of Appeals devoted most of its opinion to that issue. It was only as to that issue, and not the constitutional claim, that the Court found waiver. It ruled that since respondents had not objected to the judge's failure to charge the "on the person" exception to the presumption, they had waived their right to argue that that exception was controlling as a matter of state law (Pet. 45a-48a).

The dissenters in the New York Court of Appeals accepted both of respondents' arguments, holding that the presumption was inapplicable as a matter of state law and as a matter of constitutional law (Pet. 49a-53a).

D. The Federal Courts

Respondents thereafter filed an application pursuant to 28 USC § 2254 in the District Court for the Southern Dis-

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[6] This portion of respondent's brief to the Appellate Division is set forth in the joint appendix at 39a-44a. The corresponding portion of respondent's brief to the New York Court of Appeals is set forth in the joint appendix at 45a-52a.

trict of New York.[7] In that Court, they argued *inter alia,* that the presumption was unconstitutional, both on its face and as applied in this case (6a-9a).

The District Court, applying the "more-likely-than-not" test of *Leary* v. *United States, supra,* held that the presumption was unconstitutional as applied:

> "The test for the constitutionality of a presumption has been stated as whether 'the presumed fact is more likely than not to flow from the proved fact on which it is made to depend.' *United States* v. *Leary,* 395 U.S. 6, 36 (1969).
>
> • • •
>
> Thus, here, was it 'more likely than not' that from the mere presence of two guns in a woman's handbag, 'possession' by three others in the car could be reasonably inferred? I conclude that in the circumstances of life that inference does not reasonably follow."
>
> (Pet. 35a)

The District Court rejected the State's argument that respondents had waived their constitutional claim by failing to renew their objection after the judge omitted the "on the person" exception from his charge. Rather, the Court held that since the presumption could not constitutionally be applied in this case, and since the State had conceded that it provided the "only basis" for conviction, respondents were entitled to a dismissal at the end of the State's case, purely as a matter of constitutional law (Pet. 34a-35a).

The Second Circuit, applying the same constitutional test, concluded that possession of a weapon could not rationally be inferred from one's mere presence in an automobile in which that weapon was found (Pet. 26a). Rather,

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[7] This petition is set forth in the joint appendix at 2a-10a.

it held that such an inference would depend on many variables, including the number of persons in the car, their relationship with one another, their ownership and past use of the car, their familiarity with it, the size of the vehicle and the size, location and visibility of the gun (Pet. 27a-29a). Since it would therefore be impossible to construe this presumption in such a way as to limit it to cases in which it would be constitutionally valid, the Court held that the presumption was unconstitutional on its face (Pet. 26a).

The concurring opinion in the Second Circuit held that the court should not reach the issue of the presumption's facial constitutionality. Rather, it should limit its decision to a holding that the presumption is unconstitutional as applied in this case, and deal with other unconstitutional applications of this statute on a case-by-case basis (Pet. 30a-32a).

The Second Circuit unanimously denied petitioners' application for rehearing *en banc* (Pet. 1a).

ARGUMENT

POINT I

Respondents fully exhausted their state remedies and complied with all state procedural requirements necessary to preserve their constitutional claim for federal review.

New York State's highest court has repeatedly held that the presumption authorized by New York Penal Law § 265.15(3) is constitutional on its face. Moreover, respondents argued to the trial court and at every stage of their state appeal that the presumption was unconstitutional as applied in this case and that absent the presumption, the State had failed to present any evidence upon which their convictions could be based.

Petitioners are incorrect in alleging that the New York Court of Appeals held that respondents had waived this issue by failing to object to the omission of the "on the person" exception to the presumption in the judge's charge. Rather, that court only found that respondents had thereby waived their argument that the "on the person" exception rendered the presumption inapplicable to this case as a matter of state law.

Respondents have thus exhausted all state remedies and state procedural requirements relevant to their constitutional challenge to the presumption. The application of the presumption in this case produced a grave miscarriage of justice; four persons were convicted of jointly possessing two guns, even though both guns were found in one person's purse and there was no actual evidence of possession by any of the other three. Consequently, respondents were entitled to review of their constitutional claim by the federal courts.

A. The presumption was challenged at every stage of the state proceedings.

Respondents first challenged the presumption at the earliest possible moment in the trial proceedings, namely at the close of the State's case when it first became obvious that the State had no actual evidence of possession and was relying instead on the presumption. At that juncture, respondents orally moved to dismiss the charges, arguing that the presumption could not validly be applied to them, and that without it, the State had no proof of guilt (12a-17a).

The trial court denied the motion to dismiss and then charged the jury that they could convict on the basis of the presumption. The jury thereafter returned a verdict convicting each of the three respondents, as well as the fourth passenger in the car, Jane Doe, of possession of both of the guns found in Doe's purse.

Before judgment was imposed, respondents renewed their argument that the presumption was invalid in a written motion asking the trial court to set aside the verdict. In that motion, they specifically challenged the State's resort to the presumption in this case as being "improper both statutorily and constitutionally."[8] As for their statutory challenge, they argued that since the guns were found in Doe's purse, the "on the person" exception to the presumption rendered it inapplicable as a matter of state law (35a-36a). Secondly, they argued that the presumption was unconstitutional as applied, on the basis of the test articulated by this Court in *Leary* v. *United States*, 395 U.S. 6 (1969):

> "Second, if the presumption is applicable here, then it is unconstitutional as applied.
>
> In *Leary* v. *United States*, 395 U.S. 6 (1969), the Supreme Court held that a presumption must be regarded as 'irrational' or 'arbitrary', and hence unconstitutional, unless it can be said with substantial assurance that the presumed fact is more likely than not to flow from the proven fact upon which it is made to depend. Id. at 36.
>
> The New York test has been held to conform to that set out in *Leary;* though the actual language is somewhat different (i.e. 'based on life and life's experiences', there is a 'fair', 'natural' and 'rational' connection between the fact proved and the fact to be presumed or inferred). *People* v. *McCaleb*, 25 N.Y.2d 394, 400-401 (1969); *People* v. *Terra*, 303 N.Y. 332, 335 (1951) app. dism'd. 342 U.S. 938; *People* v. *Reisman*, 29 N.Y.2d 278, 286 (1971).
>
> Assuming that the presumption is constitutional on its face (*People* v. *DeLeon*, 32 N.Y.2d 944 (1973)), it

[8] This quote from the motion papers is set forth in the joint appendix at 34a. The motion and the relevant portions of the accompanying memorandum of law are set forth in the joint appendix at 33a-38a.

is clearly unconstitutional as applied."

(36a-37a)

Respondents then proceeded to argue at some length that the presumption was irrational in the context of this case and that absent the presumption, there was no evidence of guilt. They concluded by again asserting:

> In conclusion, it is apparent that the statutory presumption set out in § 265.15 cannot apply to those who were merely occupants of this car. This is so both statutorily and constitutionally. Without this presumption there can be no legal conviction of Lemmons, Hardrich or Allen.[9]

(38a)

The trial court denied respondents' motion to set aside the verdict. Respondents then repeated these same arguments verbatim in their briefs to both the Appellate Division[10] and the New York Court of Appeals.[11]

B. Respondents' claim that the presumption is unconstitutional as applied to this case was preserved for federal review.

It is thus clear that respondents raised the issue that the presumption was unconstitutional as applied in the trial court and at every stage of the state appeals process. Having fully "exhausted the remedies available in the courts of the State" (28 U.S.C. 2254) and having given all

[9] Respondents' affirmation in support of their motion to set aside the verdict is set forth in its entirety in the joint appendix at 35a-38a.

[10] The portion of respondents' brief to the Appellate Division Third Department which contains this argument is set forth in the joint appendix at 40a-44a.

[11] The portion of respondents' brief to the New York Court of Appeals which contains this argument is set forth in the joint appendix at 48a-52a.

three state courts an "initial opportunity to pass upon and correct" this violation of constitutional rights (*Wilwording* v. *Swenson*, 404 U.S. 249, 250 (1971)), respondents were thereafter entitled to seek relief on this issue in the federal courts.

Petitioners, in an effort to convince this Court that respondents failed to exhaust their state remedies, first insisted that respondents "failed . . . to attack the statute itself on any ground at any point" in the state proceedings (Petitioners' brief at 10). Although later conceding that respondents did challenge the statute, petitioners still claimed that that challenge was limited to an argument that the "on the person" exception to the presumption rendered it inapplicable to this case as a matter of state law.[12]

At no point in their statement of facts or their entire discussion of respondents' state court claims[13] do petitioners even acknowledge the above-quoted argument from respondents' trial and appellate papers, which squarely presents the constitutional claim. Instead, petitioners

[12] Thus, petitioners' brief states:

"B. Respondents' State Court Claims

The record clearly shows that the entire thrust of the claim respondents pressed in state court is that Penal Law § 265.15(3) should not have been applied to them because the guns were in Jane Doe's purse and thus upon her person within the meaning of one of the exceptions set forth in the statute.

• • •

After the jury returned with guilty verdicts on the two handguns counts, the respondents moved to set aside the verdicts on the same grounds upon which they moved to dismiss the indictment, i.e. that as a matter of state law, they were entitled to the benefit of the 'on the person' exception. They presented this same argument to the Appellate Division, which affirmed without opinion, and finally to the Court of Appeals."

Petitioners' brief at 11-13.

[13] Petitioners' brief at 11-14.

totally ignore these portions of respondents' state court papers, and then insist that the constitutional issue was never raised in the state courts. Thus, petitioners' waiver argument is based on a substantial misrepresentation of the relevant facts.[14]

C. Respondents' claim that the presumption is unconstitutional on its face was preserved for federal review.

Prior to the trial and appeal in this case, the New York Court of Appeals had repeatedly held that the presumption in question was constitutional on its face. See e.g. *People* v. *Gerschinsky,* 281 N.Y. 581, 22 N.E.2d 161 (1939); *People* v. *Rogalski,* 281 N.Y. 581, 22 N.E.2d 160, (1939); *People* v. *Russo,* 303 N.Y. 673, 102 N.E.2d 833 (1951); *People* v. *DeLeon,* 32 N.Y.2d 944, 300 N.E.2d 734 (1973); See also *People* v. *Leyva,* 38 N.Y.2d 160 (341 N.E.2d 546 (1975)). This ruling became so firmly established that in *People* v. *Russo, supra,* for example, the Court contended itself with a one sentence opinion stating merely:

> "The Court has already declared § 1898-a [(now § 265.15(3))] of the Penal Law to be constitutional."
>
> *Id.,* 303 N.Y. at 673, 102 N.E.2d at 833.

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[14] Petitioners do drop one footnote later in their brief which begrudgingly acknowledges that respondents made a "fleeting reference to the federal standard articulated in *Leary* v. *United States,* 395 U.S. 6 (1969)," when they challenged the presumption in the state courts (Petitioners' brief at 15, fn.). This, petitioners dismiss on the ground that except for *Leary,* "the argument placed complete reliance upon New York cases. It is thus apparent that respondents never articulated a federal constitutional claim in state court" (Id. at 15, fn.). *Leary,* is, of course, widely recognized as the leading case articulating the due process test mandated by the Federal Constitution in statutory presumption cases. Moreover, the cases cited in respondents' state court papers, from both New York and other jurisdictions, all applied the federal constitutional test. Consequently, respondents were clearly alleging a violation of their rights under the federal constitution each time they made this argument.

In the face of these uniform decisions over a span of several decades by the State's highest court, it would have been utterly futile for respondents to have urged the trial court to declare this presumption unconstitutional on its face. Consequently, in their arguments at trial and on appeal, they quite properly cited the highest court's most recent decision holding the presumption facially constitutional,[15] and then went on to argue that the provision was unconstitutional as applied in this case.

This was more than adequate to preserve the facial constitutionality issue for federal review. 28 USC § 2254 expressly relieves habeas corpus applicants of the obligation of exhausting "ineffective" state remedies. This Court and the Circuit courts have interpreted that provision to mean that where the highest state court has addressed itself to the issue raised in prior cases, and there is no indication that the state court intends to depart from those former decisions, the exhaustion doctrine does not require a petitioner to argue that issue in state court before seeking relief by habeas corpus from a federal court. See e.g. *Wilwording* v. *Swenson,* 404 U.S. 249, 250 (1971); *Perry* v. *Blackledge,* 417 U.S. 21, 23-4 (1974); *Sarzen* v. *Gaughan,* 489 F.2d 1076, 1082 (1st Cir. 1973); *Stubbs* v. *Smith,* 533 F.2d 64, 68-9 (2d Cir. 1976); *Ham* v. *North Carolina,* 471 F.2d 406, 407-08 (4th Cir. 1973); *Jackson* v. *Alabama,* 530 F.2d 1231, 1233 fn. 5 (5th Cir. 1976); *Lucas* v. *Michigan,* 420 F.2d 259, 261 (6th Cir. 1970).

Moreover, respondents' claim that the presumption is unconstitutional on its face is substantively identical to the "unconstitutional as applied" argument which respondents raised at every stage of the state proceedings. As the

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[15] Respondents' motion to set aside the verdict, set forth in the joint appendix at 37a; respondents' brief to the Appellate Division, set forth in the joint appendix at 42a; respondents' brief to the New York Court of Appeals, set forth in the joint appendix at 50a.

Second Circuit pointed out in concluding that state remedies had been exhausted in this case, both of these issues required the court to apply the test of *Leary* v. *United States,* 395 U.S. 6, 29-54 (1969) to determine the empirical validity of concluding possession from mere presence. *Allen* v. *County Court Ulster County,* 568 F.2d 998, 1001-1003 (2d Cir. 1977) (Pet. 10a-13a). Since the state courts thus had a first full opportunity to pass on this issue, the respondents were thereafter entitled to raise it in the federal courts. *Wilwording* v. *Swenson,* 404 U.S. 249 (1971); *Picard* v. *Connor,* 404 U.S. 270, 275-78 (1971).

D. Respondents did not waive their right to challenge the constitutionality of the presumption by failing to object to the omission of the "on the person" exception to the presumption from the judge's charge. The New York Court of Appeals did not hold that respondents had waived their constitutional claim; rather, that court found waiver only as to respondents' argument that the presumption was inapplicable to their case as a matter of state law.

Respondents presented the state courts with two reasons why the presumption in question should be held to be inapplicable in their case. In addition to arguing that the presumption was unconstitutional as applied, they also argued that since the guns were found in Doe's purse, the "on the person" exception to the presumption rendered it inapplicable in this case as a matter of state law. When they first raised this latter argument in their motion to dismiss at the end of the State's case, the trial court denied it (12a-17a) and thereafter instructed the jury that they could convict on the basis of the presumption without making any reference to the "on the person" exception (25a). Respondents did not renew their claim concerning the "on the person" exception by objecting to this omission from the court's charge. They did, however, thereafter raise both their state law and their constitutional challenges to the presumption in their motion to the trial court to set aside the verdict (33a-38a). The trial court also denied that motion.

Respondents raised both of these challenges to the presumption in their brief to the Appellate Division: Third Department (40a-44a). The majority of that Court affirmed without opinion. The dissenters accepted respondents' state law claim, holding that since the guns were found in Doe's purse, the "on the person" exception rendered the presumption inapplicable as a matter of state law. 44 A.D.2d 243 (1975).

Respondents also raised both their state law challenge and their constitutional challenge to the presumption in the New York Court of Appeals. The majority there rejected both arguments. Having previously held on numerous occasions that this presumption is constitutional, the Court's majority did not expressly address that issue. Rather, it simply noted that there was an "urgent need" for the presumption, given the difficulties prosecutors had in proving weapon possession without it[16] (44a-45a).

Since the dissent in the Appellate Division had accepted respondents' state law argument, the majority in the Court of Appeals devoted most of its opinion to that issue. It was only as to the issue, and not the constitutional claim, that the Court found waiver. The question of whether the guns in Doe's purse were on her person was "primarily a question of fact," the court reasoned (*Id.,* at 45a). Since the jury was never instructed as to the "on the person" exception, they were never given a chance to make this factual determination.

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[16] This justification, incidentally, was consistent with the constitutional test of a presumption's validity which was in effect at the time the presumption in this case was enacted. *Morrison* v. *California,* 291 U.S. 82 (1934) held that a fact could properly be presumed, absent rebuttal, where it was more convenient for the defendant than the prosecutor to adduce evidence of the presumed fact. (See Point IIIA 4, *infra* at 38-39).

The Court thus concluded that respondents, by failing to object to this omission in the judge's charge, had waived their right to thereafter argue that the "on the person" exception rendered the presumption inapplicable to this case as a matter of state law. "As a result, what we view as a jury question was never presented to the jury . . ." (Id., at 47a).[17] Since respondents' challenge to the constitutionality of the presumption was indisputably not a "jury question", the New York Court of Appeals was obviously not referring to that issue when they made this finding of waiver.

It is thus clear that the New York Court of Appeals did not hold that respondents had waived their constitutional claim by failing to object to the charge; nor could it properly have so held. By failing to object to the omission in the judge's charge, respondents waived, at most, their right to challenge that omission as reversible error on appeal. That omission was totally irrelevant, however, to the question of the presumption's constitutionality. Rather, as the federal district court correctly held in this case, respondents' entitlement to a dismissal of the charges against them crystallized at the conclusion of the government's case, when the prosecution stated that it was relying on the presumption to establish the possessory elements of the crimes charged (12a-17a). Absent the presumption, there was simply no evidence to sustain a conviction. *People* v. *DiLandri,* 240 A.D. 52 (1st Dept., 1937); *People ex rel. DeFeo* v. *Warden of City Prison,* 136 Misc. 835 (Sup. Ct., Kings Cty., 1930); *People* v. *Logan,* 94 N.Y.S2d 681, 683-4 (Sup. Ct., Kings Cty., 1949); *People* v. *Joseph,* 93 Misc. 2d 267 (Sup. Ct., N.Y. Cty., 1978); *People*

[17] The dissenters in the Court of Appeals accepted both of respondents' arguments. In their view, the "on the person" exception made the presumption inapplicable as a matter of state law and the *Leary* test made it inapplicable as a matter of constitutional law (appendix to the petition at 49a-53a).

v. *Alston,* 404 N.Y.S.2d 277 (Sup. Ct., Bx. Cty., 1978). Consequently, the State has repeatedly conceded that the presumption provided the "only basis" for the convictions in this case (Pet. 34a; see also joint appendix at 12a-17a; Petitioners' brief at 5). Since the presumption could not constitutionally fill this void in the State's proof, even a jury which was fully apprised of the "on the person" exception to the presumption could not have returned a valid verdict of conviction in this case. Rather, respondents were entitled from that point on to a dismissal of the charges. *Vachon* v. *New Hampshire,* 414 U.S. 478, 480 (1974).

Even if this Court were to find that the omission in the judge's charge was somehow relevant to respondents' constitutional challenge, however, respondents' failure to object to that omission would not constitute a state procedural default as to that issue. In *Wainwright* v. *Sykes,* 433 U.S. 72 (1977), this Court held that the defendant's failure to comply with Florida's contemporaneous objection rule provided a state procedural ground which was dispositive of his case. Unlike Florida, however, New York does not require a strictly contemporaneous objection in order to preserve an issue for appellate review. Rather, New York Criminal Procedure Law § 470.05(2) provides that:

> ". . . a party who without success has either expressly or impliedly sought or requested a particular ruling or instruction, is deemed to have thereby protested the court's ultimate disposition of the matter or failure to rule or instruct accordingly sufficiently to raise a question of law with respect to such disposition or failure regardless of whether any actual protest thereto was registered."

Since respondents expressly challenged the applicability of the presumption to their case, both in their motion to dis-

miss at the end of the State's case and in their motion to set aside the verdict, their failure also to register an "actual protest" to the judge's charge was not a waiver of the issue under § 470.05(2).

Moreover, New York case law has consistently held that "no exception is necessary to preserve for appellate review a deprivation of a fundamental constitutional right." *People* v. *McLucas,* 15 N.Y.2d 204 N.E. 2d 845 (1965); *People* v. *DeRenzzio,* 19 N.Y.2d 45, 224 N.E. 2d 97 (1966); *People* v. *Arthur,* 22 N.Y.2d 325, 239 N.E. 2d 537 (1968); see also *United States ex rel. Schaedel* v. *Follette,* 447 F. 2d 1297, 1300 (2d Cir. 1971). Consequently, respondents' failure to object to the judge's charge would not provide a state ground for barring them from federal habeas review, even if it was relevant to their constitutional claim.

E. In those cases where a procedural default does occur, a defendant should not be barred from federal relief where his constitutional claim would have precluded any valid conviction and where he presented his constitutional claim to the trial court and at every stage of his direct appeal.

As explained in the preceding sections, respondents did not commit a procedural default with regard to their constitutional claim by failing to object to the judge's charge. Even if they had committed a procedural default, however, *Wainwright* v. *Sykes,* 433 U.S. 72 (1977) should not be extended to bar them from federal habeas review. Alternatively, cases such as this one should come within the "cause" and "prejudice" exception recognized in *Sykes.*

In *Sykes,* the defendant failed to raise his constitutional claim at trial or at any point in his direct appeal (Id., 433 U.S. at 75). Here, to the contrary, respondents challenged the presumption in question at the end of the State's case, in their motion to set aside the verdict, and at every stage

of their direct appeal. Consequently, unlike *Sykes,* the state courts here were given a full opportunity to consider respondents' constitutional claims during the direct proceedings. *Wilwording* v. *Swenson,* 404 U.S. 249, 250 (1971).

The principal distinction between this case and *Sykes,* however, is that in *Sykes,* the constitutional challenge went to only one item of evidence—the defendant's confession. Evidence *aliunde* the confession was fully sufficient to sustain a conviction. In fact, it was so substantial that this Court found no possibility of prejudice from the introduction of the challenged statement. *Wainwright* v. *Sykes, supra,* 433 U.S. at 91. Here, to the contrary, respondents are challenging a presumption which formed the very foundation of the State's case. As previously explained (*supra,* at 18-19), without that presumption, the evidence was legally and constitutionally insufficient to sustain a guilty verdict. Consequently, unlike *Sykes,* if respondents' constitutional claim is correct, there could have been no valid conviction in this case.

Given this distinction, the considerations which led this Court to a finding of "adequate and independent state grounds" in *Sykes* actually militate against such a finding in this case. Where the constitutional challenge goes merely to one item of evidence, a timely objection might lead to exclusion of that evidence by order of the court. Failing that, the prosecutor might still elect to withhold that item of evidence, rather than risk reversal on appeal. In either event, the case could thereafter proceed to a verdict which was free of that constitutional challenge. (*Wainwright* v. *Sykes, supra,* 433 U.S. at 88-89). Here, to the contrary, if the presumption had been eliminated from the case, respondents would have been entitled to a dismissal of the charges.

For the same reason, there was no motive for defense counsel to "sandbag" in this case. *Wainwright* v. *Sykes,*

supra, 433 U.S. at 89). A motive for "sandbagging" would exist only in those cases such as *Sykes,* where a defense counsel would fear that voicing his constitutional objection to a piece of evidence at trial might lead to exclusion of that evidence, thereby enabling the prosecution to secure a conviction which was immune from that constitutional challenge on appeal. Here, a successful challenge to the presumption at trial could not have lead to constitutionally valid conviction but rather only to a dismissal.

In *Sykes,* the Court also reasoned that the defendant's failure to register a timely objection prevented the trial court from making a factual record "with respect to the constitutional claim when the recollections of witnesses are freshest" (*Id.,* at 88). Here, there was no factual record to be made; respondents' claim that the presumption is unconstitutional is purely a question of law.

The Court was also concerned in *Sykes* that excusing the defendant's failure to raise his constitutional issue at trial would detract from the perception of the trial as the "main event," and deplete "society's resources" through unnecessary collateral proceedings (*Id.,* at 90). Such would not be the case here, however, since the trial court was given a full opportunity to rule on respondent's constitutional claim.

Consequently, the rationale behind the Court's decision in *Wainwright* v. *Skyes, supra,* is inapposite to this case. Moreover, federal review is clearly mandated under the "cause" and "prejudice" exception described in that case (*Id.,* at 84-5, 90-91). The record in this case establishes that there was no improper "cause" for any procedural default. As noted above, respondents had nothing to gain by "sandbagging." Moreover, given their repeated efforts to convince the trial court that the presumption could not validily be applied to this case, any failure to pursue that issue further was clearly not a tactical decision. Rather, any such failure was due, at worst, to

"inadvertence." *United States ex rel Schaedel* v. *Follette, supra,* 447 F.2d at 1300.

The "prejudice" to respondents from this violation of their constitutional rights is substantial. This is not a case where the defendant is arguing a technical violation of the exclusionary rule in the face of otherwise overwhelming proof of guilt. *Wainwright* v. *Sykes, supra.* Here, to the contrary, there was no proof that any of the respondents possessed the guns found in Doe's purse. Rather, they were convicted solely on the basis of an arbitrary and irrational statutory presumption. If their constitutional claim is correct, they are entitled to a reversal of their conviction and a dismissal of the charges. In this context, stringent application of a procedural requirement so as to bar them from that relief would clearly constitute a serious "miscarriage of justice." *Wainwright* v. *Sykes, supra,* 433 U.S. at 91.

POINT II

Respondents did not take a direct appeal to this Court from the state's highest court; consequently they are entitled to challenge the constitutionality of New York Penal Law § 265.15(3) by federal habeas corpus proceedings.

Respondents did not appeal directly to this Court from the decision of the New York Court of Appeals on their claim that the New York Penal Law § 265.15(3) was unconstitutional. Rather, they presented that claim, as well as their numerous other constitutional claims, to the federal district court in a habeas corpus proceeding pursuant to 28 U.S.C. § 2254.

Petitioners argue that *Wainwright* v. *Sykes,* 433 U.S. 72 (1977) should be extended to bar any defendant who is challenging the constitutionality of a state statute from raising that issue by federal habeas corpus. Instead, peti-

tioners insist, such defendants should be allowed to seek federal review only by taking a direct appeal to this Court under 28 U.S.C. § 1257.

Petitioners are unable to cite a single case which imposes, or even suggests, such a requirement. To the contrary, Congress and this Court have squarely rejected it. 28 U.S.C. § 2254 limits exhaustion requirements for habeas corpus proceedings to "remedies available in the courts of the State." Since this Court is not a state court, appeal to it is not a remedy "available in the courts of the state." *Fay* v. *Noia,* 372 U.S. 391, 435-36 (1963). Consequently, a defendant is not required to exhaust the proceedings available to him under 28 U.S.C. § 1257 before seeking habeas corpus relief from a federal district court. *Fay* v. *Noia, supra,* 372 U.S. at 435-36. Although *Fay* v. *Noia, supra,* involved the certiorari provisions of § 1257, § 2254 makes no distinction between petitioners who would have been eligible to take a direct appeal under § 1257 and those who would have been limited to seeking a writ of certiorari under that provision. The Court's statutory interpretation of § 2254 in *Fay* is therefore equally binding in cases such as the present proceeding where a defendant would have been entitled to take a direct appeal. Thus, this Court has not found waiver in habeas corpus appeals involving the constitutionality of a state statute despite the fact that the defendant did not take a direct appeal to this Court from the state's highest court. See e.g. *United States ex rel. Stevens* v. *McCloskey,* 239 F.Supp. 419, aff'd 345 F.2d 305, rev'd sub nom *Stevens* v. *Marks,* 383 U.S. 234 (1966).

Since petitioners' proposal would require an amendment of § 2254, they are obliged to take their recommendation to Congress, rather than to this Court, which lacks the power to adopt it:

> If the authority of the federal courts is to be more limited than that provided by the present [habeas corpus] statute, that limitation must be made by the Congress.
>
> *United States ex rel. Elliott* v. *Hendricks,* 213 F.2d 922, 929 (3d Cir. 1954).
>
> It follows that we should not write in limitations [in the habeas corpus statute] which Congress did not see fit to make.
>
> *Price* v. *Johnson,* 334 U.S. 266 284 (1948).

See also *Lockhart* v. *United States,* 136 F.2d 122, 124 (6th Cir. 1943).

Moreover, it is doubtful whether any branch of government could constitutionally adopt what petitioners suggest. Their proposal would suspend the right of habeas corpus review for any defendant entitled to direct appeal under 28 U.S.C. § 1257. Consequently, it would appear to violate Article 1, section 9, clause 2 of the United States Constitution. In this regard, petitioner's proposal is markedly different from 28 U.S.C. § 2244(c), which provides only that a defendant voluntarily waives his right to habeas corpus review if he elects instead to seek review by this Court under § 1257.

Petitioners insist that their proposal would serve "considerations of comity" (Petitioners' brief at 20). Comity is fully served, however, when the state courts have been given a first fair opportunity to pass on the constitutional issue. *Wilwording* v. *Swenson,* 404 U.S. 249 (1971). Thereafter, any interest the state may have in a speedy federal disposition is outweighed by this Court's interest in a full examination of the Constitutional issues by the lower federal courts:

> Our function of making the ultimate accommodation between state criminal law enforcement and state prisoners' constitutional rights becomes more meaningful when grounded in the full and complete record

> which the lower federal courts on habeas corpus are in a position to provide.
>
> *Fay* v. *Noia, supra,* 372 U.S. at 438.

Similarly, the state's interest in avoiding conflict with the lower federal courts is fully protected by their right to seek review by this Court of any adverse decision. *Id.,* 372 U.S. at 437-38.

Petitioners' claim that their proposal would serve federal interests in "judicial economy" is also invalid (Petitioners' brief at 21-22). To the contrary, petitioners' proposal would serve only substantially to increase this Court's case load. Any habeas corpus petition thus barred from the lower federal courts would surface instead as a § 1257 appeal on this Court's already overcrowded docket. At present, many such cases never reach this Court, having been disposed of, frequently on other grounds, by the lower federal courts. Moreover, those federal habeas cases which do eventually reach this Court are chosen by the Court under its certiorari powers, rather than being forced upon it as an appeal under § 1257.

Nor is petitioners' proposal likely to reduce the overall caseload of the federal judiciary, as petitioners insist. Most § 2254 applicants seeking to challenge the constitutionality of a state criminal statute have other constitutional challenges to their convictions as well. Since the latter cannot be raised on direct appeal under § 1257, petitioners' proposal would force each such defendant to initiate two federal proceedings instead of one—a § 1257 appeal challenging the constitutionality of the state statute, and a § 2254 proceeding raising the rest of his constitutional claims. Such duplication of cases is clearly not in the interests of judicial economy.

Finally, even if this Court should find merit in petitioners' new exhaustion requirement, it should not apply that requirement to bar respondents from habeas corpus review

in this case. This is not a case, such as *Wainwright* v. *Sykes, supra,* where the defendant failed to comply with an existing, clearly defined procedural rule. To the contrary, at the time respondents elected to proceed under § 2254 rather than § 1257, both the relevant statutes and the case law indicated that such an election was entirely proper. To bar respondents from the relief they have been granted because they did not follow a procedure which was previously not required of them and which is presently no longer available to them would be particularly unjust.

POINT III

New York Penal Law § 265.15(3) is unconstitutional on its face and as applied to this case.

New York Penal Law § 265.15(3) provides that in most circumstances, the presence of a firearm in a car is presumptive evidence of its possession by all persons occupying that car. In the present case, that presumption was employed to convict four persons of jointly and simultaneously possessing two guns found in one of those person's handbag. Application of the tests articulated by this Court establishes that this presumption is unconstitutional, both on its face and as applied in this case.

A. The presumption is unconstitutional on its face.

The Second Circuit, applying the test of *Leary* v. *United States,* 395 U.S. 6 (1969), held that the mere fact that people are present in a car does not make it more likely than not that they all jointly and simultaneously possess any weapon found therein. Indeed, the legislative history of this statute establishes that the presumption was enacted because without it, prosecutors were unable to convince juries or judges that such an inference was rational. The presumption was intended to shift the burden of proving who possessed the weapon to the defense. Conse-

quently, the Court correctly concluded that the presumption was unconstitutional on its face.

1. The presumption should be judged by the "reasonable doubt" standard.

In its most recent presumption cases, this Court judged the validity of the presumptions in question by applying two tests—the "more-likely-than-not" test and the "reasonable doubt" test. The former provides that a presumption is "unconstitutional unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." *Leary* v. *United States,* 395 U.S. 6, 36 (1969). The latter requires that a statutory presumption be rejected unless "the evidence necessary to invoke the inference is sufficient for a rational juror to find the inferred fact beyond a reasonable doubt." *Barnes* v. *United States,* 412 U.S. 837, 843 (1973). In *Leary* v. *United States, supra,* and in the portion of *Turner* v. *United States,* 396 U.S. 398 (1970), dealing with the cocaine presumption, the Court found that the presumptions in question were unconstitutional because they failed to satisfy even the more lenient "more-likely-than-not" test. In the portion of *Turner* v. *United States, supra,* dealing with the heroin presumption, as well as in its most recent decision on presumptions, *Barnes* v. *United States, supra,* the Court held that the challenged presumptions were constitutional because they satisfied even the "reasonable doubt" test. Since the Court has never been presented with a presumption which satisfied one test but not the other, it has never been required to determine which test is in fact controlling.

Respondents submit that the presumption in question in this case fails to satisfy either of these tests. In the event that this Court should conclude that the presumption satisfies the "more-likely-than-not" test but not the "reasonable doubt" test, however, the presumption should be held to be unconstitutional. The "reasonable doubt" test

is the more appropriate standard by which to judge this criminal law presumption.

The "more-likely-than-not" test, or rather the "rational connection" test from which it evolved,* was first articulated by the Court in judging a presumption in a civil case, *Mobile, J. & K.C.R. Co.* v. *Turnipseed,* 219 U.S. 35 (1910). Thereafter, it was also applied to criminal presumptions, without regard for the more stringent standard of proof in the latter cases. See *e.g., Tot* v. *United States,* 319 U.S. 463 (1943); *Leary* v. *United States, supra.*

The "more-likely-than-not" test is appropriate to the testing of civil presumptions, since it is consistent with the "preponderance of the evidence" standard by which verdicts are reached in such proceedings. In criminal trials where guilt must be established beyond a reasonable doubt, however, the relationship which must be shown between the proven and presumed facts in order to satisfy the "more-likely-than-not" test is simply not sufficient. This is particularly true in cases such as the present, where the statutory presumption authorizes an inference not merely of a single fact, but rather of guilt itself. For such an inference to be treated as valid merely because it was "more-likely-than-not" would constitute an unconstitutional dilution of the burden of proof. See generally *In re Winship,* 397 U.S. 358, 364 (1970). Consequently, a presumption should not be employed in a criminal case unless the connection between the proven fact and the inferred fact is so certain that a rational juror could find the inferred fact beyond a reasonable doubt.

Petitioners argue that the "more-likely-than-not" test is controlling in this case because this Court "has never applied the 'reasonable doubt' standard to federal law presumption" (Petitioners' brief at 28). That claim is simply incorrect; this Court applied the "reasonable doubt" test

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* See *Leary* v. *United States, supra,* 395 U.S. at 33 fn. 56.

in both of its most recent presumption cases—*Turner* v. *United States, supra,* and *Barnes* v. *United States, supra.*

Petitioners also insist that only the "more-likely-than-not" test should be applied here because state law presumptions are "entitled to a more lenient standard of review from the federal courts than federal law presumptions" (Petitioners' brief at 28-9). Constitutional due process recognizes no such distinction between the rights of federal and state defendants. To the contrary, this Court has repeatedly held that state statutory presumptions must comply with the same constitutional standard as federal statutory presumptions. See *e.g. Morrison* v. *California,* 291 U.S. 82 (1934); *Bailey* v. *Alabama,* 219 U.S. 219 (1911); *Mobile J. & K.C.R. Co.* v. *Turnipseed,* 219 U.S. 34 (1910); *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U.S. 61 (1911); *McFarland* v. *American Sugar Ref. Co.,* 241 U.S. 79 (1916); *Manley* v. *Alabama,* 279 U.S. 1 (1929); *Western & Atl. R.R.* v. *Henderson,* 279 U.S. 639 (1929); see also *United States* v. *Romano,* 382 U.S. 136, 139 (1965).

Even assuming *arguendo* that New York State could reduce the burden of persuasion in criminal cases, as Petitioners imply,* it has not done so. Consequently, its presumptions should comply with the same standard which it mandates for conviction—proof beyond a reasonable doubt. The presumption in this case should therefore be judged by that test.

2. Mere presence does not support an inference of possession.

Although respondents submit that the "reasonable doubt" standard is controlling here, they will hereafter discuss the presumption, as did the federal courts below, in terms of the more lenient "more-likely-than-not" test. If the presumption fails to satisfy even that test, it is clearly unconstitutional under any standard. *Leary* v. *United States, supra,* 395 U.S. at 36, n.64; *Turner* v. *United States, supra,* 396 U.S. at 405.

* Petitioners' brief at 28-29.

Under the "more-likely-than-not" test, the presumption in this case is unconstitutional unless it can at least be said with substantial assurance that all of the passengers in a car, by their mere presence, are more likely than not to be in simultaneous possession of any and all weapons found therein. Contrary to satisfying this test, the presumption here flies in the face of rationality. As the Court below found:

> We fail to find any rational basis for such an inference, either in logic or experience. There is nothing about the simultaneous presence of occupants and a gun in an automobile that makes it more likely than not that the former control the latter or that they even know of its presence. The presumption obviously sweeps within its compass (1) many occupants who may not know they are riding with a gun (which may be out of their sight), and (2) many who may be aware of the presence of the gun but not permitted access to it. Nothing about a gun, which may be only a few inches in length (e.g., as Baretta or Derringer) and concealed under a seat, in a glove compartment or beyond the reach of all but one of the car's occupants, assures that its presence is known to occupants who may be hitch-hikers or other casual passengers, much less that they have any dominion or control over it. Although New York has created exceptions to the presumption for three situations in which it would be especially anomalous to infer possession—where the gun is found upon the person of one of the occupants, where the weapon is found in an automobile being operated for hire by a licensed driver, and where one of the occupants has a license to carry the weapon—the presumption remains irrational in that class of cases in which it does apply.
>
> (Pet. 21a-22a)

The Court's conclusion is clearly correct. Day to day experience establishes that a person's mere presence is insufficient to establish his possession of items found in his vicinity. As this Court found in a related context in *United States* v. *Romano, supra,* 382 U.S. at 141:

> The United States has presented no cases in the courts which have sustained a conviction for possession based solely on the evidence of presence. All of the cases which deal with this issue and with which we are familiar have held presence alone, unilluminated by other facts, to be insufficient proof of possession.

Petitioners nevertheless seek to convince this Court that New York has redefined "possession," at least with regard to firearms possession, so as to make a person guilty of that crime if he is merely within "reach" of a weapon, i.e. if he is riding in a car in which the weapon is found (Petitioners' brief at 38). Such is clearly not the case, however. To the contrary, New York law requires that one have actual physical control or dominion over a weapon in order to possess it. New York Penal Law § 10.00(8). Merely being within reach of the weapon is not enough:

> The cases construing the word "possession" under section 1897 of the Penal Law make conviction impossible unless there is shown which occupant of the automobile possessed the pistol, and this notwithstanding the fact that its presence in an automobile makes it available for instant use by any of the occupants. (People v. Persce, 204 N.Y. 397; People v. Andreacchi, 221 App. Div. 136; People v. Kevlon, Id. 224.)
>
> *People ex rel. DeFeo* v. *Warden of City Prison,* 136 Misc. 836 (Sup. Ct., Kings Co., 1930).

Petitioners' novel definition of "possession" would also create a conflict with the fundamental tenet of New York Penal Law that every crime must involve a "voluntary act." New York Penal Law § 15.10. The fact that a person is

within "reach" of a weapon does not establish that he knows it is there, or that he has voluntarily placed himself within reach of it. *People* v. *Andreacchi, supra,* 221 A.D. at 136.

Since actual control or dominion is an essential element of this crime, the New York courts have uniformly held that, absent the presumption, a person could not be presumed to be in possession of a weapon found in a car merely because of his presence in that car:

> It cannot be held with any degree of certainty that the revolver which was found on the floor of the car belonged to the defendant or was in his constructive possession rather than in the possession of one of the other occupants of the car.
>
> *People* v. *DiLandri,* 250 A.D. 52 (1st Dept., 1937).

See also *People* v. *Anthony,* 21 A.D.2d 666 (1st Dept., 1964); *People* v. *Andreacchi, supra,* 221 A.D. at 136; *People ex rel. DeFeo* v. *Warden of City Prison,* 136 Misc. 836 (Sup. Ct., Kings Co., 1930); *People* v. *Logan,* 94 N.Y.S.2d 681, 683-4 (Sup. Ct., Kings Co., 1949); *People* v. *Joseph,* 93 Misc.2d 267 (Sup. Ct., N.Y.Cty. 1978); *People* v. *Alston,* 404 N.Y.S. 2d 277 (Sup. Ct., Bx. Cty., 1978).

3. The presumption in question was enacted because mere presence in a car did not support an inference of possession.

Ironically, the presumption in question was enacted, not because the inference authorized therein was rational, but rather because the courts and juries had uniformly rejected it as irrational. As the Court noted in *People* v. *Logan, supra*:

> The purpose sought to be achieved by the provisions of section 1898-a is plain . . . Prior to the passage, in 1936, of section 1898-a, and under the decisions which up until such time had construed the meaning to be given the word "possession," as contained in section 1897, it

was often found impossible to obtain convictions against occupants of automobiles in which a proscribed weapon was discovered. The difficulty which was thus encountered was born of the inability, under such circumstances, to fasten the onus of possession directly upon any one of the particular individuals then present in the car. It was because of this great handicap which thus confronted the prosecution officers that the late Mr. Justice Lewis in People ex rel. De Feo v. Warden of City of Prison, 136 Misc. 836, 241 N.Y.S. 63, called attention to "the urgent need for legislation making the presence of a forbidden firearm in an automobile or other vehicle presumptive evidence of its possession by all the occupants thereof." He also stated that: "Such an amendment would require the occupants of an automobile to explain the presence of the firearm and enable the court to fix the criminal responsibility for its possession."

Id., 94 N.Y.S.2d at 683

The court then went on to note that the presumption was to be invoked if "there is an absence of satisfactory evidence of the ultimate fact to be established, to wit: To which of the occupants is 'possession' attributable?" (*Id.*, 94 N.Y.S. 2d at 683.)

The New York Court of Appeals, in the present proceeding, confirmed that the presumption in question was enacted because of the "difficulties" prosecutors were having in securing convictions for weapons possession in automobiles without it (*People* v. *Lemmons, supra,* 40 N.Y.2d at 510) (Pet. 44a). It also confirmed that the conclusion of possession from mere presence was irrational:

> Traditional analysis precluded a finding that any of several occupants of the automobile was sufficiently close to the weapon as to be in actual possession of it.
>
> *Id.*, 40 N.Y.2d at 510 (Pet. 44a).

It was thus the very irrationality of this inference which created the "urgent need for legislation" statutorily authorizing it (*Id.*, 40 N.Y.2d at 510). Prosecutors were unable to persuade juries or appellate courts that an inference of possession from mere presence was justified in the absence of such statutory persuasion. Moreover, the presumption was to be invoked in precisely those instances when it was most unconstitutional, namely when the evidence alone would not justify such an inference.

The legislative history of this provision confirms this improper purpose. Petitioners, in an effort to convince this Court that the presumption was adopted because of its rationality, herald the commissions, "numerous public hearings," fifty point questionaire, and "exhaustive" studies which accompanied its adoption and later amendment. Those undertakings were not occasioned by this presumption, however; rather, they were concerned with revision of the entire New York Penal Code. The legislative documents relating to those proceedings in fact establish that the presumption in question was adopted with very little discussion. Moreover, on the few occasions that it was mentioned, it was justified not because it was rational, but rather because it was "necessary," given the difficulty of securing convictions without it. Thus, in their extensive description of the legislative history of this presumption (Petitioners' brief at 29-37), petitioners fail to cite a single instance in which the presumption was endorsed because it was rational.*

In 1936, when it was originally adopted, the presumption was supported solely on the basis that law enforcement

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* Indeed, petitioners can cite only one instance in the entire history of this presumption in which "reasonableness" was even mentioned. On that occasion, this term was used only in a table to one legislative report, and then only in reference to the desirability of excluding certain circumstances from the application of the presumption. REPORT OF THE NEW YORK STATE JOINT LEGISLATIVE COMMITTEE ON FIREARMS AND AMMUNITION, NEW YORK LEG. DOC. No. 29, 21 Table 5 (1962).

officials were encountering difficulty in proving possession of guns found in automobiles containing more than one passenger:

> Under these circumstances, it is practically impossible for the police authorities and the district attorneys to secure a conviction on the charge of unlawful possession of a gun.
>
> Bill Jacket for 1936 New York Laws, Chapters 216 and 390.

See also Public Papers of Governor Herbert H. Lehman—1936, 459 (1940).

Similarly, Senator Erway, author of the 1963 version of the presumption, wrote in urging the governor to sign the measure:

> The presumption of possession of a dangerous weapon in an automobile is most necessary to proper police work. Before this enactment, it was impossible to prove possession if the article was found in an automobile occupied by several people. The foregoing Bill has the wholehearted support of the New York State Troopers and the Police.
>
> Letter of Senator Erway of April 4, 1961, set forth in the Senate Bill Jacket for 1961 New York Laws, Chapter 500.

Other supporters of the 1963 version voiced the same sentiments:

> . . . if the weapon is found in an automobile and all persons in the automobile deny ownership, the police officer is helpless.
>
> Senate Bill Jacket for 1961 New York Laws, Chapter 500.

Although petitioners cite a "fifty point questionnaire . . . distributed to each of the sixty-two district attorneys,

nearly all criminal court judges in the state, police chiefs and numerous rod and gun clubs" as one of the state's undertakings which established the rationality of this presumption, that questionnaire in fact refutes petitioners' claims.* At no point in the questionnaire were those being polled requested to express their opinion as to the rationality of the presumption in question. Moreover, the responses to the four questions** which did pertain in some way to the vehicle presumptions set forth in § 265.15, established that those polled regarded those presumptions as being irrational as presently worded. Thus, 93 percent of those polled felt that the presumption af weapon possession should not apply to a passenger who was in a stolen car under duress. Eighty-six percent felt that the stolen car under duress. Seventy-one percent felt that the presumption should not apply to an "occupant who was neither the driver nor owner and who is unaware of the weapon which is kept out of sight in a glove, trunk or other

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* The questionnaire and responses are contained in the REPORT OF THE NEW YORK STATE JOINT LEGISLATIVE COMMITTEE ON FIREARMS AND AMMUNITION, N.Y. LEG. DOC. No. 29, 27-33 (1962).

** The questionnaire asked for yes or no answers to the following questions pertaining to the presumptions currently found in § 265.15:

> 35. Where there are multiple occupants of a stolen vehicle, should the presumption of possession arising from presence of a weapon (§ 1898) apply to an occupant there under duress:
>
> 36. Same as #35 for an occupant who is a police officer.
>
> 37. Do you know any reason why the list of weapons should be different in the case of the presumption for the stolen vehicle (§ 1898) from that in the case of an automobile other than a public omnibus (§ 1898-a)?
>
> 38. Should the presumption of possession arising from presence of a weapon in an automobile (§ 1898-a) apply to an occupant who is neither the driver nor owner and who is unaware of the weapon which is kept out of sight, in a glove, trunk or other compartment?

compartment." Nevertheless, § 265.15 still applies to all of these situations.

4. The presumption was enacted for the improper purpose of shifting the burden of proof on the element of possession to the defense.

In addition to confirming that the presumption was irrational, the history of this legislation also establishes that it was enacted for an unconstitutional purpose—namely to shift the burden of proving who possessed the weapon to the defense. As the New York Court of Appeals noted in this case, the presumption was intended to "require the occupants of an automobile to explain the presence of the firearm and enable the court to fix the criminal responsibility for its possession." (Pet. 45a).

In 1936, when this presumption was first enacted, the most recent case from this Court indicated that a presumption could shift the burden in this fashion if the evidence necessary for conviction was more likely to be available to a defendant than to the prosecution. *Morrison* v. *California,* 291 U.S. 82, 90-91 (1934). However, this "test of comparative convenience" was reduced to a "corollary" in *Tot* v. *United States,* 319 U.S. 463, 469 (1943) and then discarded altogether in favor of the "more-likely-than-not" test in *Leary* v. *United States, supra,* 395 U.S. at 34-35, 44-45.

It has thus now been firmly established that a presumption may not shift the burden of proving or disproving an element of the crime to the defendant, as this presumption does, merely because he is more likely to have access to the relevant evidence than the prosecution. Rather, to the extent that such a shift is inevitable in any situation in which a presumption is applied, it is constitutionally tolerable only when the presumption itself is first shown to be rational. *Barnes* v. *United States,* 412 U.S. 837,

846 n. 11 (1973); see also *Turner* v. *United States,* 396 U.S. 398, 408 n. 8; *Leary* v. *United States, supra,* 395 U.S. at 34: *Tot* v. *United States, supra,* 319 U.S. at 469. Since the presumption in this case does not satisfy that requirement, this shift in the burden of proof is impermissible.

B. The statutory presumption in New York Penal Law § 265.15(3) is unconstitutional as applied in this case.

The application of the presumption in this case produced the patently irrational result that all four passengers in a car were convicted of the simultaneous possession of the same two guns, even though the State's only evidence was of possession by only one of those passengers. The three respondents in this proceeding were all convicted merely because they were riding in the same car as one Jane Doe, in whose handbag both guns were found. That handbag, located between Doe's right leg and the right front car door next to which she was sitting was out of reach of the other three passengers, and the State introduced no evidence whatsoever to indicate that any of them had ever had actual or constructive possession of either of the guns or that they even knew that the guns existed.

Given these facts, the federal district judge and all three of the judges on the Second Circuit panel in this case found that respondents' convictions were constitutionally intolerable. Items in personal accessories, such as Jane Doe's handbag, have traditionally been regarded as being within the possession and dominion of the accessory's owner. Even New York case law recognizes this commonly accepted fact. *People* v. *Pugash,* 15 N.Y.2d 65 (1964), cert. denied, 380 U.S. 936, appeal dismissed, 382 U.S. 20 (1965). Moreover, the pocketbook had Doe's papers in it and Doe ad-

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• Indeed, the only instance in which "reasonableness" was even mentioned was in a table to one legislative report, and then, only in referring to one of the exceptions to the presumption.

mitted to the police that it was her bag. Respondent Lemmons was out of the car at the time of the seizure and respondents Hardrick and Allen were in the rear seat of the car, away from Doe and the guns. Under these circumstances, any claim that the three respondents as well as Doe all simultaneously possessed the guns in Doe's pocketbook "would verge on the irrational." *United States* v. *Tavoularis,* 515 F.2d 1070, 1075 (2d Cir. 1975).

• • •

Petitioners have failed to cite a single decision by the New York Court of Appeals or a single legislative authority which has analyzed the presumption in question and found that it satisfied the "reasonable doubt" test or even the "more-likely-than-not" test. To the contrary, the history of this legislation establishes that it was enacted pursuant to the now discredited "test of comparative convenience", because of the difficulty prosecutors were encountering in convincing either courts or juries that such an inference was rational.

A statutory presumption is merely an aid to the jury in reaching a rational verdict; it may not be employed as a substitute for that process. *Tot* v. *United States, supra,* 319 U.S. at 467. Where, as here, legislative history, judicial interpretation and empirical analysis establish that the presumption has no rational basis in fact, it must be disallowed. Consequently, the Court below, applying the proper tests, declared this presumption unconstitutional. That decision should be upheld by this Court.

POINT IV

The Court below was correct in reaching the question of whether New York Penal Law § 265.15(3) was unconstitutional on its face, once the court had determined that the statute was unconstitutional as applied, and that it was incapable of being construed in such a manner so as to limit it to cases in which it could constitutionally be applied.

For the reasons set forth in Point III of this brief and the majority opinion of the Second Circuit in this case, the presumption in question is unconstitutional on its face. Although the concurring opinion in the Second Circuit does not dispute the correctness of this determination, it nevertheless urges that the federal courts should confine themselves to holding this statute unconstitutional as applied in this case. Regardless of whatever validity such restraint may have in other contexts, it is inappropriate here.

The Fifth and Fourteenth Amendments limit the power of a state legislature to make the proof of one fact evidence of the existence of the ultimate fact on which guilt is predicated. *Tot* v. *United States,* 319 U.S. 463, 467 (1943); *United States* v. *Romano,* 382 U.S. 140, 139 (1965). As this Court noted in both *Tot* and *Romano*:

> Where the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them it is not competent for the legislature to create it as a rule governing the procedure of courts.
>
> *Tot* v. *United States, supra,* 319 U.S. at 468;
> *United States* v. *Romano, supra,* 382 U.S. at 139.

Thus, the Court is dealing here not with an isolated governmental action which violated one, or a few, persons' constitutional rights at some time in the past. Rather, it is faced with an enactment of a state legislature which transgresses the limitations imposed on it by the federal Constitution

and continually violates the constitutional rights of those subjected to it as long as it remains in effect.

If § 265.15(3) is allowed to continue as a part of the New York Penal Law, despite its apparent unconstitutionality, large numbers of citizens will improperly be subjected to the deprivations, distress and expense of indictment, conviction and punishment. Some will belatedly be vindicated on appeal or by habeas petition to the federal courts, but only after they have suffered the irreparable injuries of trial and incarceration. Others, induced to plead guilty in order to limit their jeopardy, will never be set right.

Petitioners nevertheless insist that this Court, even when faced with a statute which is unconstitutional on its face, should eschew a holding to that effect, and limit itself only to granting relief to the parties before it. Since the "case or controversy" requirement (United States Constitution, Article III; *Buckley* v. *Valeo,* 424 U.S. 1, 11 (1976); *Baker* v. *Carr,* 369 U.S. 186, 204 (1962)) limits most challenges to such statutes to individual proceedings in which one of the parties claims to have been aggrieved by the operation of that statute, petitioners' position would preclude this Court from ever voiding an unconstitutional statute. Moreover, although the "case or controversy" requirement serves the salutary purpose of limiting unnecessary litigation, petitioner's proposal would have precisely the opposite effect, forcing the federal courts to entertain countless petitions by persons entitled to relief from enforcement of the same unconstitutional provision. Such redundancy would serve neither the interests of justice nor those of judicial economy.

Consequently, from the earliest days of its existence, this Court, when confronted with state statute which is unconstitutional on its face, has exercised the authority to declare it so. See, e.g., *M'Culloch* v. *Maryland,* 17 U.S. (4 Wheaton) 316 (1819). Thus, this Court has repeatedly held state statutory presumptions to be facially unconstitutional, even

though in each instance the issue was presented to the Court, as here, by individual litigants in the context of an individual case. See, e.g., *Manley* v. *Alabama,* 279 U.S. 1 (1929) (state statute creating a presumption of fraud from every bank insolvency, held unconstitutional on its face); *Western & Atl. R.R.* v. *Henderson,* 279 U.S. 639 (1929) (state statute creating a presumption of Railroad's negligence from fact of railroad crossing collision, held unconstitutional on its face); *McFarland* v. *Am. Sugar Ref. Co.,* 241 U.S. 79 (1916) (state statute creating presumption of participation in an illegal monopoly from (1) fact that defendant paid less for sugar in state than out of state or (2) fact that defendant kept his sugar refinery idle for more than one year, held unconstitutional on its face); *Baily* v. *Alabama,* 219 U.S. 219 (1911) (state statutory presumption making failure to perform a service prima facie proof of intent to defraud, held unconstitutional on its face).

Several factors make a finding of facial unconstitutionality particularly appropriate in this case. As the Court below recognized, this is not a case where imposing one or two clearly identifiable qualifications on the presumption in question would limit it to situations in which it could constitutionally be applied. Thus, for example, the Courts have held that certain presumptions concerning drugs are valid as to cocaine as long as they are applied only in cases involving "dealership quantities" of that drug. See, e.g., *Turner* v. *United States,* 396 U.S. 398, 415-18 (1970); *United States* v. *Gonzalez,* 442 F.2d 698 (2d Cir. 1971) (en banc), cert. denied sub nom. *Orvalle* v. *United States,* 404 U.S. 845 (1971); *Lopez* v. *Curry,* 583 F.2d 1188 (2d Cir. 1978).

Here, however, no such rehabilitation of the presumption is possible. Rather, as the Second Circuit recognized:

> . . . the empirical relationship between proved and presumed facts turns . . . on a variety of circum-

stances and on the largely unpredictable combinations in which they occur . . .

• • •

Absent direct evidence, an inference of joint possession [of a weapon] on the part of occupants [of a car] depends on many variables, including the number of occupants of the car, the nature of the relationships between them, their ownership or past use of the automobile, their familiarity with it, the size of the vehicle and the size location and visibility of the gun.

Allen v. *County Court, Ulster County, supra,* 568 F.2d at 1010 (Pet. 27a-29a).

Where a statute can be brought into line with Constitutional requirements, if at all, only after substantial "revision of its text," or revisions which would render the statute no longer "intelligible," a finding of facial unconstitutionality is clearly mandated. *United States* v. *Raines,* 362 U.S. 17, 22-3 (1960); *United States* v. *Reese,* 92 U.S. 214, 219-220 (1876); *Winters* v. *New York,* 333 U.S. 507, 518-20 (1948).

Similarly, a holding that this presumption is unconstitutional on its face is necessitated by the fact that this presumption is clearly unconstitutional in a vast majority of the cases in which it would apply. Rarely, if ever, would presence alone, unaided by other facts, be sufficient to establish possession. *United States* v. *Romano, supra.* 382 U.S. at 140. It is significant in this regard to note that following the Second Circuit's decision in this case, numerous New York Courts have held the presumption unconstitutional as applied to a variety of factual situations. See, e.g., *People* v. *Joseph,* 93 Misc.2d 267 (Supreme Court, New York County, 1978) (2 passengers in car); *People* v. *Alston,* 404 N.Y.S.2d 277 (Supreme Court, Bronx County, 1978) (gun in glove compartment).

Since this presumption would be unconstitutional in a vast majority of the cases in which it would arise, this Court should hold it unconstitutional on its face even if the Court finds that the presumption would be valid in a few isolated situations. Every statutory presumption which has been held by this Court to be unconstitutional on its face would have been valid in certain contexts. Thus, a railroad crossing collision might be presumptive of negligence on the part of the railroad where it was also shown that the railroad had failed to erect proper warning devices at that crossing. Nevertheless, this Court declared such a presumption unconstitutional on its face. *Western & Atl. R.R.* v. *Henderson,* 279 U.S. 639 (1929). A bank insolvency might be presumptive of fraud where it was also shown that the bank president had diverted the bank's funds to his own use. Nevertheless, this Court declared such a presumption unconstitutional on its face. *Manley* v. *Alabama,* 279 U.S. 1 (1929). Similarly, the presumption in this case should be set aside, even if it could be validly employed in a fraction of the cases it originally designed to cover. *United States* v. *Raines, supra,* 362 U.S. at 23; *Butts* v. *Merchants & Miners Transportation Co.,* 230 U.S. 126 (1913).

This is particularly true where, as here, the presumption "would be upheld only in instances where the evidence would, independent of the statute, support [the authorized] inference . . ." *Allen* v. *County Court, Ulster County, supra,* 568 F.2d at 1010 (Pet. 29a). In such cases, convictions could be secured without resort to the presumption. Consequently, petitioners' only possible reason for seeking to preserve this presumption is to have it available for those cases in which the evidence itself does not support an inference of possession. Yet, it is precisely those cases in which the presumption cannot constitutionally be applied. Since the presumption thus serves no valid purpose in any case and since its continued existence will result only in further

violations of constitutional rights, it should be voided at this time.

This issue is also governed by that line of cases holding that a statute must be invalidated

> . . . if the words of the statute or its legislative history make it indisputably clear that [the legislature] intended a result which is unconstitutional . . .
>
> *Buckley* v. *Valeo,* 519 F.2d 821, 878, affirmed in part, reversed in part, 424 U.S. 1 (1976).

See also *United States* v. *Thompson,* 452 F.2d 1333, 1341 (1971); cf. *King* v. *Smith,* 392 U.S. 309, 335-36 (1968) (Douglas, concurring). Here, both the words of the statute and those of its legislative supporters establish that this presumption was intended as an unconstitutional substitute for legitimate proof of possession, improperly shifting the burden of proof to the defendant in those instances where the prosecutor had no evidence of possession and could not convince the jury to infer possession from the evidence he did have.

Finally, this case is analogous to those cases in which a finding of facial unconstitutionality was mandated by the fact that unconstitutional application of the statute was "capable of repetition yet evading review." *Storer* v. *Brown,* 415 U.S. 724, 737, fn. 8 (1974). In determining whether to allow a statute such as the presumption in question to remain in effect, this Court cannot close its eyes to the practical effects of doing so. As previously explained, many innocent passengers in vehicles in which weapons are found will be improperly subjected to judicial jeopardy, imprisonment and expense as long as this statute continues in effect. Given the practical and legal demands of pursuing state appeals and federal habeas corpus proceedings, few will ever be vindicated. Considerations of comity are ill served at such a price.

Petitioners' reliance on *United States* v. *Raines,* 362 U.S. 17 (1960) and the other cases cited in their brief at 22 for the proposition that federal courts should always eschew facial analysis of a statute, is misplaced. Those cases hold only that one against whom a statute may constitutionally be applied does not have standing to argue that the statute is invalid in his case because it might be constitutional as applied to other persons. Here the statute in question was clearly unconstitutional as applied to respondents. Once that fact had been established, the federal courts were authorized, and indeed obliged, to determine whether the statute could be construed in such a fashion as to limit its application to cases in which it would be constitutionally proper. Since the presumption in this case could not be so construed, it was properly declared unconstitutional on its face.

CONCLUSION

The order and judgment of the United States Court of Appeals should be affirmed. New York Penal Law § 265.15(13) should be declared unconstitutional on its face and as applied in this case.

Dated: New York, New York
December 28, 1978

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1554

COUNTY COURT ULSTER COUNTY, NEW YORK; WOODBOURNE CORRECTIONAL FACILITY, WOODBOURNE, NEW YORK,

Petitioners,

against

SAMUEL ALLEN, RAYMOND HARDRICK and MELVIN LEMMONS,

Respondents.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

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TABLE OF AUTHORITIES

I. *Cases*

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ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

A.

Respondents repeatedly contend that they raised their federal constitutional claim at every stage in the state proceedings. In fact, however, they did not allege even a colorable constitutional claim until *after* the trial was completed, the verdict rendered and the jury discharged.

Faced with the fact that they failed to make a relevant and timely objection at the crucial stage in the state pro-

ceedings, respondents minimize the significance of the absence of this critical *pre*-verdict objection and argue instead that their *post*-verdict motion, a motion made weeks after the allegedly unconstitutional instruction was given, was sufficient to preserve the error for federal habeas review. This argument is entirely without merit.

In *Wainwright* v. *Sykes*, 433 U.S. 72, 91 (1977), after carefully weighing the important interests served by a state's contemporaneous objection rule, this Court concluded that a criminal defendant who believes that he is about to be deprived of a federal constitutional right by some action of the trial court, must make this objection known in time for the defect to be cured or thereafter waive any claim of error. Respondents' post-trial motion failed to satisfy this requirement.

Respondents also attempt to draw the Court's attention away from their procedural default by magnifying the importance of the routine motion to dismiss made earlier in the trial.* In so doing, they implicitly concede that the post-verdict motion did not preserve their claim. In any event, the mere fact that respondents questioned the applicability of the "on the person" exception at an earlier stage in the trial cannot excuse their patent waiver at the later, critical juncture in that proceeding.

B.

Equally without merit is respondents' assertion that their failure to object to the incomplete instruction at the trial level was irrelevant to consideration of their claim of error on appeal. This argument, which is premised upon the unwarranted assumption that New York does not have a

* The record (12a-17a) demonstrates that this motion was clearly not of constitutional dimension. Moreover, respondents appeared to acquiesce in the trial court's ruling (see colloquy on p. 17a) that the applicability of the exception was a question of fact for the jury to consider.

procedural forfeiture rule, is beside the point. The relevant inquiry is not whether New York has a strict or lenient forfeiture rule, but whether the state courts gave preclusive effect to that rule in this case.

It is well-settled law in New York that where no objection or exception is taken to a charge, and no request is made to charge differently, an alleged error in the charge is not saved for appellate review. *People* v. *Kibbee*, 35 N.Y. 2d 407, 321 N.E. 2d 773 (1974); *People* v. *Schwartzman*, 24 N.Y. 2d 241, 247 N.E. 2d 652, cert. den., 396 U.S. 846 (1969); *People* v. *Simmons*, 22 N.Y. 2d 533, 240 N.E. 2d 22, cert. den., 393 U.S. 1101 (1968); *People* v. *Mills*, 98 N.Y. 176 (1885); *People* v. *Thompson*, 41 N.Y. 1 (1869); *People* v. *Congilaro*, 60 A.D. 2d 442, 400 N.Y.S. 2d 409 (4th Dept. 1977). New York Criminal Procedure Law § 470.15 (6)(a) does provide that in the discretion of the intermediate appellate court, and in the interests of justice, an error or defect not protested at trial may nevertheless be considered on appeal. However, such discretion is cautiously exercised, *People* v. *Strieff*, 41 A.D. 2d 259, 342 N.Y.S. 2d 543 (4th Dept.), affd., 35 N.Y. 2d 22, 315 N.E. 2d 762 (1973); *People* v. *Travison*, 59 A.D. 2d 404, 400 N.Y.S. 2d 188 (3rd Dept. 1977) and may not thereafter be disturbed.

In *People* v. *Kibbee, supra,* a defendant who waived objection to a jury instruction at trial attempted to raise the claim on appeal. The Appellate Division refused to consider it. The Court of Appeals, in declining to disturb that ruling stated:

> "We also reject the defendants' present claim of error regarding the trial court's charge. Neither of the defendants took exception or made any request with respect to the charge regarding the cause of death. While the charge might have been more detailed, appellants' contention that the Appellate Division should have reversed for its claimed inadequacy in the inter-

ests of justice (CPL 470.15, subd. 3, par. [c]; subd. 6, par. [a]) may not be here reviewed, for the intermediate appellate court's refusal to so reverse was exclusively within its discretion (*People* v. *D'Argencour,* 95 N.Y. 624; *People* v. *Calabur,* 178 N.Y. 463; see, also, Cohen and Karger, Powers of the New York Court of Appeals, § 155)." 35 N.Y. 2d at 413-414.

The view of the New York Court of Appeals in *Kibbee* is especially relevant, since here, too, the defendants failed to make a timely objection to the sufficiency of the jury instruction.

Consequently, the fact that the Appellate Division actually exercises its power in particular cases does not deny the existence of a forfeiture rule. It merely means that in those cases the failure to object *did not* in fact result in a forfeiture.

It is also not pertinent to respondents' argument that the New York Court of Appeals has inherent power to consider constitutional claims notwithstanding a trial waiver.•

• The mere existence of an appellate court's power to consider claims not properly raised below underscores rather than denies the existence of a forfeiture rule. Rule 52(b) of the Federal Rules of Criminal Procedure provides a dispositive analogy. While Fed. Rule Crim. Proc. Rule 30 provides that:

> "[n]o party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection",

Rule 52(b) provides that:

> "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

Notwithstanding these seemingly inconsistent provisions, respondents would be hard-pressed to question the existence of a forfeiture rule in the federal courts. See *Francis* v. *Henderson,* 425 U.S. 536 (1976); *Davis* v. *United States,* 411 U.S. 233 (1972).

While two of the cases upon which respondents rely, *People* v. *McLucas,* 15 N.Y. 2d 167, 204 N.E. 2d 846 (1965) and *People* v. *Arthur,* 22 N.Y. 2d 325, 239 N.E. 2d 537 (1968), indicate the Court of Appeals' willingness, in certain circumstances, to review constitutional claims not properly raised below, these cases do not represent an across-the-board diminution of the objection requirement in all cases. *People* v. *DeRenzzio,* 19 N.Y. 2d 45, 224 N.E. 2d 97 (1966); *People* v. *Patterson,* 39 N.Y. 2d 288, 347 N.E. 2d 898 (1976), affd. sub nom. *Patterson* v. *New York,* 432 U.S. 197 (1977).•

It is thus beyond dispute that New York has a forfeiture rule. The only remaining issue for purposes of determining the availability of habeas corpus review is whether the state courts enforced the rule in a particular case. *Hankerson* v. *North Carolina,* 432 U.S. 233, 244, n. 8 (1977); *Francis* v. *Henderson,* 425 U.S. 536, 542, n. 5 (1976); *Lefkowitz* v. *Newsome,* 420 U.S. 283 (1975).

As the Appellate Division affirmed the convictions without opinion and five judges of the Court of Appeals explicitly stated that they were unable to reach respondents' "as applied" claim because of the waived objection, it is evident that the state courts gave preclusive effect to respondents' waiver. Accordingly, the New York courts' construction of New York's forfeiture rule is binding upon this Court. *Mullaney* v. *Wilbur,* 421 U.S. 684, 690-691 (1975).

• In *Patterson,* the New York Court of Appeals emphasized the "narrow historical exception" to the traditional waiver rule and concluded that Patterson's claim that his charge deprived him of a properly conducted trial merited consideration. One of the chief considerations of the court was that this Court's decision in *Mullaney* v. *Wilbur,* 421 U.S. 684 (1975) could not have been anticipated at the time Patterson's jury was charged. However, *Leary* v. *United States,* 395 U.S. 6 (1969), the case upon which respondents primarily rely, was decided five years before their trial, and merely restated constitutional principles previously enunciated by this Court.

Respondents, however, reading between the lines of the Court of Appeals' opinion, maintain that the state courts merely found a forfeiture of the state law claim. Therefore, they argue that the "constitutional" claim, a claim which was never raised at trial, was preserved for purposes of federal scrutiny.* There are two defects in this argument.

First, assuming *arguendo* (a) that respondents raised a federal constitutional claim in the state courts and (b) that the state courts had the power to consider that claim notwithstanding a failure to object, it must further be assumed that in affirming the convictions after noting the failure to object, the Court of Appeals refused to consider the constitutional claim because of the waiver.

Second, as this Court recognized in *Hankerson* v. *North Carolina, supra,* 432 U.S. at 245, n. 8 (1977),

> "[t]he states, if they wish, may be able to insulate past convictions by enforcing the normal and valid rule that failure to object to a jury instruction is a *waiver of any claim of error.*" (emphasis supplied)

See also *Henderson* v. *Kibbee,* 431 U.S. 145, 157 (1977) (BURGER, C.J., concurring); *Frazier* v. *Weatherholtz,* 572 F. 2d 994, 998-999 (4th Cir., 1978).

Although respondents attempt to artificially bifurcate their claim into state and federal components, it is apparent that the "constitutional" claim respondents raised on appeal emanated directly from the unmade objection. Therefore, the Court of Appeals could not have affirmed respondents' convictions without rejecting both components. Any other interpretation of the Court of Appeals' decision would blunt the spirit of the *Sykes* rule and permit the type of maneuvering by the defense which this Court in *Sykes* explicitly sought to eliminate in criminal trials.

* Of course, respondents never presented to any New York court the federal constitutional claim they advanced in their petition for habeas corpus relief. Not only was the statute itself never challenged in state court, but respondents explicitly framed their claim of entitlement to the exception in terms of the "New York test". Since the New York courts merely considered the arguments respondents offered, *Picard* v. *Connor,* 404 U.S. 270 (1971), they can hardly now be charged with having had an opportunity to consider and pass upon the constitutional claim respondents advance herein. *Wilwording* v. *Swenson,* 404 U.S. 249, 250 (1971).

C.

Respondents' claim that it would have been futile to urge either at trial or on appeal that the presumption is unconstitutional is yet another indirect concession that this claim was never properly raised in the state courts. Moreover, even if "futility" were ever a valid justification for failing to make an objection known at the proper time, it may not excuse the default in this case.

Although respondents contend that the cases they cite on page 14 of their brief constitute a long line of "uniform decisions over a span of several decades" upholding the constitutionality of Penal Law § 265.15(3), in point of fact *People* v. *DeLeon,* 32 N.Y. 2d 944, 300 N.E. 2d 734 (1973), is the only case cited by respondents which post-dates *Leary* v. *United States,* 395 U.S. 6 (1969). *DeLeon* is hardly illustrative of respondents' point. Not only was DeLeon's conviction affirmed without opinion by both the Appellate Division, 38 A.D. 2d 900, and the Court of Appeals, but the Appellate Division dissent clearly indicated that the conviction rested on grounds other than the presumption.*

* The "long line" of authority may be reduced by at least two cases, since in fact two citations, *People* v. *Rogalski,* 281 N.Y. 581, 22 N.E. 2d 160 (1939), and *People* v. *Gerschinsky,* 281 N.Y. 581, 22 N.E. 2d 160 (1939), refer to the same opinion, and *People* v. *Leyva,* 38 N.Y. 2d 160, 341 N.E. 2d 546 (1975) involved Penal Law § 220.25 rather than § 265.15(3), and is thus inapposite.

In sum, the cases cited by respondents fail to support respondents' contention that the presumption's constitutionality has been recently, much less repeatedly, reaffirmed by New York's highest court.

In any event, were this Court to accept respondents' interpretation of the "ineffective state remedy" exception to the exhaustion requirement of 28 U.S.C. § 2254, state prisoners would *never* be required to raise their federal constitutional claims in state court so long as they were able to unearth a state decision, no matter how hoary, which held contrary to their claim.

D.

In a final effort to extricate themselves from the effect of their obvious procedural default, respondents suggest that the failure to raise their claim in a timely and relevant fashion was attributable to "inadvertence". Respondents' Brief, pp. 22-23. Not only was this excuse never suggested before, but it is belied by the record.

Respondents' counsel clearly had advance knowledge that the court intended to instruct the jury on the presumption. For example, Mr. Torracea, counsel for respondents Allen and Hardrick, stated in his summation:

> "If you think that Hardrick and Allen had exercised dominion and control over the weapons in the purse, then follow the law as the judge gives it to you on the presumption of what was in the purse as to all four or three or two or one." (22a)

Consequently, this is not a case where counsel may claim surprise. Nor is it a case where the opportunity to object was lost in the heat and confusion of a trial. Moreover, respondents, unlike the District Attorney, failed to submit requests to the court in advance of the charge. Although the court invited requests and exceptions to the charge on three occasions, and there was a lengthy colloquy covering

other aspects of the charge at that time, respondents did not so much as hint that they were dissatisfied with the content of the instructions. It is therefore apparent that respondents, for reasons of their own, sat back and deliberately allowed every opportunity to object to pass them by.

E.

Respondents' analysis of the applicable substantive law is also deficient. While they state "authoritatively" that the presumption permits a conviction for possession upon proof of proximity alone, they are unable to point to a single New York case which supports this proposition. To the contrary, New York law requires proof of knowing and voluntary possession. *People* v. *Persce,* 204 N.Y. 397 (1912); *People* v. *Russo,* 278 App. Div. 98, 103 N.Y.S. 2d 603, affd., 303 N.Y. 673, 102 N.E. 2d 834 (1951); *People* v. *Cohen,* 57 A.D. 2d 790 (1st Dept. 1977); *People* v. *Valentine,* 54 A.D. 2d 568 (2d Dept. 1976); *People* v. *Trisvan,* 49 A.D. 2d 913, 373 N.Y.S. 2d 405 (2d Dept. 1975); *People* v. *Furey,* 13 A.D. 2d 412 (1st Dept. 1961). See also *United States* v. *Freed,* 401 U.S. 601, 612-614 (1971) (BRENNAN, J. concurring); *United States* v. *Davis,* 346 F. Supp. 405 (W.D. Pa. 1972).

Thus, while an instruction on the presumption contained in Penal Law § 265.15(3) may aid the jury in its determination of the element of possession, the jury's inquiry may not end there. It must also be satisfied that the defendant had the requisite mental state. This determination may not be inferred merely from the simultaneous presence of the accused and the weapon in the same vehicle, but must be supported by independent proof. *People* v. *Russo, supra,* 278 App. Div. at 103. In essence, by misrepresenting that the presumption permits a jury to convict solely upon evidence of simultaneous presence of an accused and a weapon in the same vehicle, respondents have imposed the element of strict liability upon New York's weapons

possession statutes. This construction is contrary to the overwhelming weight of New York law and must be rejected.

It is the requirement that the prosecution independently prove the requisite mental state which makes the presumption in Penal Law § 265.15(3) rational, and therefore constitutional. Once the requisite mental state has been established, the presumption simply permits a jury to infer that an individual in close proximity to a weapon has that weapon within his immediate reach and control. Consequently, it does no more than accord the prosecution's evidence its natural probative force and effect. Since the relationship between the proved fact, presence, and the presumed fact, possession, is so close, an inference of one from the other must satisfy any test of logic and common sense this Court deems appropriate. The decision below, which accepts respondents' argument that there is no rational connection between proximity and possession, fails to take into account New York's substantive law, and should be reversed.

Dated: New York, New York,
February 15, 1979.

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